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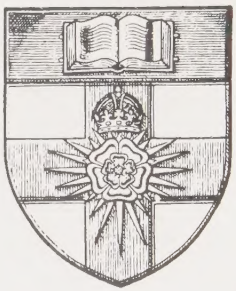

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THE

CRIMINAL APPEAL REPORTS.

WITH

SUBJECT INDEX, TABLES OF CASES AND STATUTES CITED.

EDITED BY

HERMAN COHEN,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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1910.

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CRIMINAL APPEAL RULE.

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ERRATA.

Page 17, last line. For "Moody," read "1 Moody."
Page 180, line 19. For "3 Cr. App. R.," read "2 Cr. App. R."
Page 257, head-note For "1961," read "1861."
Pages 264 and 268. The correct references to *Brown* are on p. 261.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BUCKNILL, AND MR. JUSTICE BRAY.

JAMES UNSWORTH.

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14 *January.*
James Unsworth

Voluntariness of confession.

This was an appeal from the order of Phillimore J. refusing leave to appeal against conviction, and legal aid. The applicant was convicted on December 14th, 1909, at the West Derby Hundred Quarter Sessions of housebreaking, and sentenced by the Chairman to five years' penal servitude. The applicant was not present, and was not represented by counsel.

BUCKNILL J.: The question turns upon the admissibility of statements made by the applicant after his arrest, and after he had been before the justices in petty sessions on one occasion. On 21st November, 1909, a man named Riley, who was convicted of housebreaking, was seen, arrested and identified at the same time that another man was seen with him, and who was not then identified. He was described as being like the applicant. The police watched the applicant's house. He returned to the house at about six o'clock in the morning, and had apparently not been there during the night. When he saw the police officers he ran away. After his arrest and while in the cells his daughter came to him for the purpose of getting a written order from him to enable her to obtain wages due to him. While in the cells he made a statement which the Bench held was a voluntary statement. He said to a constable, "I think my father will get it (meaning the wages) all right," and added, "I wish I was out of this lot. I didn't know what I was doing when Riley kept egging me on. I told him I was working now, and did not want to bother with this sort of thing." As to the safe, his statement was, "I said 'I don't know how we should get the safe open when we get it.' We went into the house with the key." The constable told him

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James Unsworth.

that a bar had been found, and applicant replied, "That bar has been knocking about some time. I am heartily sick of it." It was principally upon that evidence that he was convicted. The Court holds that it was a statement made voluntarily. There was no suggestion that there was any inducement held out to him, any hope or any fear on his part. Being voluntary, it was admissible, and being admissible it was that evidence which to a great extent led the jury, very properly, to find him guilty.

Application dismissed.

Kate Chalker.

KATE CHALKER.

Manslaughter—Cruelty.

Direction to the jury on an indictment for manslaughter as to finding a misdemeanour under sect. 12 (4) *of* 8 *Edw.* 7, *c.* 67, *the Children Act.* 1908.

This was an appeal, by leave of L. Coleridge J., against conviction and sentence at the Central Criminal Court on December 10th, 1909, on an indictment for manslaughter. The appellant and her husband were indicted for the manslaughter of Cissie Bell, a child six months old. Channell J. sentenced each of them to five years' penal servitude. There were two other indictments against the appellant and her husband for manslaughter, and an indictment for illtreating and neglecting children, which were not proceeded with. Both prisoners were found guilty upon the indictment charging them with the manslaughter of Cissie Bell. In the case of each prisoner consent was given to other cases, including an indictment at the Maidstone Assizes for the manslaughter of Reginald Stacy, and cruelty to a child named Moore, being taken into consideration, and sentence was given accordingly.

J. D. Cassels for the appellant (under sect. 10 of the Criminal Appeal Act), who was present. Appellant and her husband were baby farmers, and had been in the habit of receiving young children to nurse. Among others they received the child Cissie Bell in March, 1909, when it was a fortnight old, its mother, a single woman, paying them £6 to take charge of it. An inspector

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Kate Chalker.

of the Society for the Prevention of Cruelty to Children saw it at Maidstone in March, 1909, when it was a few weeks old, and suggested that a doctor should be called to it. A doctor was accordingly summoned, and on that occasion apparently his advice was carried out, but when the inspector called again in May he found the appellant and her husband had gone away, taking the child with them. After that they were found to have gone from place to place, always removing during the night. The evidence for the prosecution was that Cissie Bell had been exposed in cold weather slightly clad, had not been provided with sufficient food, and had been generally neglected. Sergt. Berry, a coroner's officer, stated that on September 10th he found Cissie Bell lying on a dirty floor in a room of the lodgings then occupied by the appellant and her husband at Penge, covered with rags. The appellant's evidence was, however, that the child was in a cradle. In September one of the children died while they were at Penge. Prisoners had notice to attend the inquest on it, but hurried away, and eventually were arrested on another charge. At 4 a.m. on the morning of September 17th the appellant was seen standing in the roadway at Penge with Cissie Bell in her arms. Her explanation was that she was going to Peterborough to her husband's home. She and her husband, with Cissie Bell and other children, were given shelter in the police station, and Cissie Bell, after being examined by the divisional surgeon, was taken to the infirmary. Cissie Bell was under treatment in the infirmary from September 17th to November 1st, when she died—the death being attributed to chronic enteritis, malnutrition and neglect. There was not sufficient evidence before the jury to justify a verdict of manslaughter. The only verdict returnable on the evidence was one of cruelty (misdemeanour) under s. 12 of 8 Edw. VII. c. 67 (the Children Act, 1908). There was not sufficient evidence to connect the ill-treatment by the appellant with the death of the child six weeks after she had ceased to have any control over it. The condition of the child was very low at the time it was seen by the witnesses. Malnutrition might have been due to mal-assimilation, and the wasting away of the child to natural weakness, and not to the conduct of the appellant. It was reasonable to suppose that there had been proper treatment in the infirmary. There was not sufficient evidence to enable the jury to say that the

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Kate Chalker.

death was a direct result of the conduct of the appellant, and in these circumstances the Court ought to exercise its power under sect. 5 (2) of the Criminal Appeal Act, and substitute for the verdict of the jury a verdict of guilty of cruelty under sect. 12 (4) of the Children Act, 1908.

[The Lord Chief Justice : It was clearly put before the jury that they could find her guilty of cruelty.]

Yes, but there were other circumstances before the jury relating to other children who were not the subject of the indictment.

Barrington Ward, for the Crown, was not called upon.

The Lord Chief Justice : There is only one point that could be considered, and that is whether there was sufficient evidence to connect the death of the child with the treatment it had previously received from the appellant. There is no question of misdirection by the learned judge, nor is it suggested that the jury did not have the question fully before them whether there was sufficient evidence to justify them in convicting not only of cruelty but of manslaughter. The appellant made a number of statements which were untrue, and she failed to account for injuries from which the child was found to be suffering. Mr. Cassels asks the Court to say that there was no evidence to connect the death of the child with its treatment by the appellant, but on careful consideration of the facts the Court cannot possibly accept that argument. A child of six months old was taken out night by night, morning by morning, on several occasions away from its home, and there had been such want of nourishment that there was no fat at all in the stomach or in the body. If it had been a case of some disease whereby the food could not be assimilated there would in all probability have been some evidence to that effect. There is no evidence of any disease supervening after the child was taken to the infirmary, and there is nothing to account for its death except the terrible treatment it had received at the hands of the appellant. The question was fully raised and considered by the jury, and there is no ground now to interfere.

Appeal dismissed.

JESSIE BYERS.

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Jessie Byers.

Sect. 12 *of* 8 *Edw.* 7, *c.* 67. *the Children Act*, 1908 (*a*).
An improvement in the condition of the child after the cruelty has ceased is no bar to a conviction for manslaughter.

This was (1) an appeal against a conviction at the Central Criminal Court on December 9th, 1909, for manslaughter, and (2) an application for leave to appeal against sentence by Channell J. of ten years' penal servitude.

Appellant was indicted for the manslaughter of Reginald Turnbull, a child five months old, by neglect and improper treatment.

Valentine Ball for the appellant (under sect. 1 of the Criminal Appeal Act), who was present. The father of an illegitimate male child, born on June 12th, 1909, got into communication with appellant, who agreed to take the child out of the mother's charge altogether, and hand it over to her married daughter, who would adopt it. On June 23rd the child was taken over by the appellant and her daughter, and the evidence shewed that from June 23rd until July 27th it was actually under their charge and control. The mother did not see the child again until November 2nd. On June 27th a witness was at the appellant's house, and on that occasion there was no doubt that the appellant administered a dose of laudanum to the child. There was a controversy as to how much. Appellant said one drop, the witness two drops. That was the only evidence of any laudanum having been administered. There was no evidence before the jury as to the nature of the food which she gave the child, nor was there any evidence as to whether the child was properly fed or improperly fed. On July 27th a lad found under some bushes in Finsbury Park a string bag containing the child, which was alive, and was at once taken to the infirmary. The child when born was apparently a well-formed and well-made child. It weighed $9\frac{1}{2}$ lbs. and it increased in weight down to June 23rd, when it weighed 10 lbs. When found in the bag it was very much reduced in weight. When weighed at the Edmonton In-

(*a*) See also the headnote to *Chalker* (above, p. 3).

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firmary on August 1st it was only 7 lbs. 14 ozs., and under proper treatment at the infirmary it increased in weight steadily down to October 17th, when it weighed 8 lbs. 7½ ozs. It died on November 14th from a wasting disease. From the reduction in weight between June 23rd and August 1st the medical men inferred that the child had been improperly treated—that because the child died from a wasting disease on November 14th it had therefore been improperly treated between June 23rd and July 27th. The fact that the child increased in weight after it went into the infirmary was an important element in considering whether the treatment it received before July 27th really had anything to do with the death. There was not sufficient to shew that what the appellant did caused the death. It was a startling proposition that this death happening nearly five months afterwards should be laid at the appellant's door. There were other offences of which appellant might be found to be guilty.

M. Shearman, for the Crown, was not called upon.

Bucknill J.: The defence set up by the appellant was that she had taken the child from its mother and had passed it on to Mr. and Mrs. Ferguson within a week from the date on which she received it, and that therefore the child was never under her control at all. The jury must have disbelieved that. The only question was—What was the cause of the death? Was it culpable negligence by the appellant or not? The judge who tried the case pointed out to the jury as carefully as it could possibly be done what it was that the jury would have to find before they could convict the appellant of manslaughter—that although they might find her innocent of manslaughter, there was an alternative way in which they might find her guilty. He pointed out that they must be satisfied of identity—that the child found in the bag was the child of the mother in question. If it were not the child there was an end of the case; if it was the child there was evidence that it died of a wasting disease. The doctors said that a disease of that kind might be congenital, but that the common cause of it was the absence of proper food. He then pointed out what the jury would have to be satisfied of before they could find that there had been cruelty in the legal sense with regard to the child. The Court thinks that the verdict was

supported by the evidence. The evidence of the doctor was that the child was of full weight when born, but was afterwards very much reduced. When taken into the infirmary it did for a time increase in weight, and then it fell off again. The jury must have believed that the child did die from the wasting disease. The only other question to consider is whether there was such culpable negligence as to cause that disease to come into existence. How can the Court say that there was not sufficient evidence to justify such a belief? The jury were amply justified in coming to the conclusion that the child died of a wasting disease, which disease was caused by improper food, and perhaps also by the administration of doses of laudanum. It is impossible for the Court to come to any other conclusion than that the verdict was fully justified.

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Jessie Byers.

Appeal and application dismissed.

JAMES CULLEN.

James Cullen.

Severity of sentence mitigated by good conduct since the last conviction.

This was an appeal by leave of Phillimore J. against a sentence of twelve months' imprisonment with hard labour passed at the West Derby Hundred Quarter Sessions on December 14th for breaking a public-house window. Appellant was not present, and was not represented by counsel.

R. K. Chappell for the Crown. Appellant went to the public-house shortly before closing time in a drunken condition, and smashed the window.

[The Lord Chief Justice: He was turned out of the public-house by the barman, and then smashed the window. He had been violent once or twice before, but having regard to the nature of the offence a sentence of twelve months' hard labour seems somewhat severe.]

Appellant had been previously convicted in 1904. It was a very bad case of damaging property.

Bray J.: The term ought to be reduced to five months from the date of the conviction. The appellant was a man of very

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violent habits, and had been convicted of assault on several occasions. But so far as the Court can see he had been conducting himself well since the last conviction. We rather gather that he has been in regular work. In the circumstances the sentence will be reduced to five months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

Alfred Kams.

ALFRED KAMS.

Misdirection, but "no substantial miscarriage of justice"—If a mistake is made in summing-up, counsel ought to correct it—Degree of corroboration of accomplice considered.

This was an appeal against conviction on a point of law and from the order of Phillimore J. refusing similar leave on grounds of fact.

Appellant was convicted on December 13th, 1909, at the Central Criminal Court of being concerned with Adolf Grosberger and one Shepherd Marks in forging and uttering a cheque for £264, with intent to defraud the London Joint Stock Bank (Ltd.). Marks had been previously convicted. Kams and Grosberger were each sentenced by Mr. Commissioner Rentoul to four years' penal servitude. Kams now appealed on the grounds that (1) the judge misdirected the jury in his summing up, (2) the judge did not properly tell the jury what was his defence, (3) after the close of the case for the prosecution the judge ought to have directed the jury that there was not sufficient corroboration of the convict Marks's evidence, and that thereupon they must find appellant not guilty.

J. F. P. Rawlinson, K.C. (with him *H. H. Curtis-Bennett*) for the appellant, who was present. On September 9th, 1909, a cheque-book was obtained from the bank upon a forged order, in the name of Corby, Palmer and Stewart. On the following day, September 10th, a cheque for £175, bearing that signature and out of the cheque-book so obtained, was successfully cashed, and on 13th September a cheque for £264 out of the same book was presented at the bank, but suspicion having been aroused,

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Alfred Kams.

the person presenting the cheque was arrested. That man's name was Shepherd Marks. He was tried and convicted at the Central Criminal Court in October. At his trial he was identified as the man who actually presented the order and obtained the cheque-book on September 9th, out of which the cheque was taken. Marks was tried and convicted on one indictment only, viz., of forging and uttering the cheque for £264 on 13th September, and was sentenced to five years' penal servitude. Evidence connecting him with the uttering of the order for the cheque-book was admitted on the count for forging that cheque. After his conviction, he applied for leave to appeal, which was refused by the single judge, and he appealed to the full Court against such refusal. While that appeal was pending, and before the hearing, Marks made a statement implicating the appellant, Grosberger, and another man. In consequence, appellant and Grosberger were arrested, and Marks gave evidence on oath against them. Marks, whose appeal was subsequently dismissed, denied that he presented the order for the cheque-book on September 9th, although he was identified, and was convicted. He stated that he was in Leeds on Sunday, 12th September, 1909, and on that day he received a telegram, "Come immediately, reply Alf." He subsequently, on the same day, sent a telegram addressed to Kams, "Arriving St. Pancras 9.40 ; meet me." Kams did not meet him, and he went to Kams's house late that night, after going to a friend's house first. He said Kams asked him (Marks) to meet him (Kams) at the "Unicorn" public-house next morning at 10, and that he did so. He said that Kams took him to another public-house, "The Wooden Shades," and introduced him to two foreigners, who were already there, that one of them (Grosberger) pulled out the cheque, and that Kams looked at it and asked him (Marks) to go to the bank and cash it, and that the fourth man went with him to the bank and handed him the cheque, which he presented. He (Marks) was then arrested. Marks gave the police a signed statement which differed in several particulars from his evidence. There was no proof at the trial that Kams had any connexion with the sending of the telegram to Marks, or with the cheque for £175, which was successfully cashed. It was proved that the telegram was sent by Grosberger. A witness named George Edward Brown was the only one in addition to the accomplice Marks who gave any evidence connecting the appel-

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lant with the cheque for £264. He was barman at the "Wooden Shades." He was taken on 22nd October, six weeks after the date in question, by the inspector of police to the street in which Kams lived. He saw a man come on to a doorstep just in front of him and identified him as a man he had seen before. That was Kams. He had only seen one other man pass him in the street. Brown swore that the four men were in the bar about half an hour, but when Kams and Grosberger were put up for identification at the police-station he picked out Kams, but not Grosberger, as one of the men who were in the bar on the morning of the 13th September. Kams, in the witness box, swore that he knew nothing of the telegram to Marks, that he was surprised to receive one from Marks, and that not wanting to see him, he did not go to the railway station as requested in the telegram. He said that Marks called on him late on the evening of the 12th and asked him to cash a cheque, but that he (Kams) would have nothing to do with him. Appellant absolutely denied that he was at the public-house on September 13th. There was no corroboration worthy of the name, which ought to have been left to the jury of the story which the accomplice Marks told. Such corroboration as there was was Brown's statement that he was at the public-house on the morning of the 13th September. Upon that there was, it is submitted, a very serious misdirection by the learned Commissioner. He said: "Now the remark was made, 'Suppose you believe Marks'—but suppose you do not believe Marks, then, gentlemen, there is no question of corroboration at all." He pointed out that there was a discrepancy in regard to one part of the statement and proceeded—"but at any rate the next day Kams is in that public-house about the hour that is named. I think there can be no possible doubt about that, because Kams did not deny it." A later passage was—"Therefore I think you must take it that Kams was undoubtedly there in that public-house at that hour; but, as I say, the question is who was the other man." Then, speaking of corroboration, the judge said, "Kams was there; with whom was he there?" That, in fact, was the whole point in dispute. Were it not for the evidence of Brown that appellant was at the public-house at the time he mentioned, there would be absolutely no corroboration of the accomplice Marks's story against Kams. In addition, the learned Commissioner said, "Kams did not deny it," whereas

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Kams did most strongly deny it. That was a misdirection of a material character upon which the conviction ought not to be allowed to stand. Assuming that the jury had found that Brown was right in saying that the appellant was there, even then it would not be sufficient corroboration upon the authority of two recent cases in that Court—*Everest*, 73 J. P. 269 ; 2 Cr.App. R. 130 (1909) ; *Warren*, 73 J. P. 359 ; 25 T. L. R. 633 ; 2 Cr. App. R. 194 (1909). The jury should have been warned far more strongly than they were that Marks's story had been found to be untrue, that he had been convicted, and that it had been proved that Marks was at the bank on 9th September, and got a cheque-book upon a forged order. That being so, the whole of his story ought to have been looked upon with the greatest suspicion. Moreover, the way in which Marks came to give the information ought, again, to have put the jury on their guard. That statement was made to an inspector of police in the cells at the Royal Courts, and Marks had stated in evidence that he did not make any request for the inspector to see him at the Royal Courts.

[*R. D. Muir* for the Crown. The important statement was made before he was committed for trial, and was in writing.]

The main point is that there was no corroboration of the story of the accomplice on which the jury could act, and even if there is anything which amounted to corroboration, there is clear misdirection on the part of the learned Commissioner.

[The Lord Chief Justice : Was counsel for the prisoner present during the summing-up ?]

Curtis Bennett : I appeared for appellant at the trial. I did not suggest to the learned judge that appellant denied being at the public-house. I did not hear the judge's statement with regard to this. I must have been talking to someone at the moment.

[The Lord Chief Justice : If counsel for the prisoner had addressed the jury shortly before and said that the man was not at the public-house it is most astonishing, when the judge told the jury there was no doubt Kams was there, that no objection was taken by counsel at the time.]

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R. D. Muir for the Crown. Mr. Oddie, my junior, who was in Court and following the learned Commissioner closely, did not hear him make the statement which appears on the shorthand notes. If he had heard it he certainly would have corrected it. The learned Commissioner, in referring to appellant's alleged presence in the public-house, only stated on one occasion that "Kams did not deny it."

[Bray J.: He states not that it is his view of the evidence that Kams was there, but "Kams was there."]

When a judge, addressing a jury, says "the fact was," it means "my view of the evidence is that the fact was." Appellant's case at the trial was that he was not in the public-house on that morning. It is incredible, therefore, that the learned judge should have told the jury that Kams admitted he was in the public-house.

It is clear that the learned judge did not withdraw the question from the jury. He was merely expressing his own view. It was assumed that there was a direct conflict between Kams and Marks. In my address to the jury I argued the question of Kams being at the public-house on the day named. When you get two men telling contradictory stories—one saying as part of his story that the accused was in a public-house on a particular morning for the purpose of the crime, and the accused saying, "I never was there at all," it is impossible to say that the fact being proved that the accused was in the public-house is not corroboration of the accomplice in a material particular. He cited *Tate*, (1908) 2 K. B. 680; 72 J. P. 391; 1 Cr App. R. 30, 39; C. C. R. It was for the Court to consider whether the learned judge properly cautioned the jury with regard to corroboration. If he did, the verdict could not be upset.

[The Lord Chief Justice: Apart from misdirection, if the jury believed Brown's statement that the man went to the public-house on that morning, it could scarcely be suggested that there was no corroboration on a material point.]

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The sending of a telegram by Marks to the appellant was some corroboration of Marks's story. *Re Meunier*, (1894) 2 Q. B. at 418 ; 63 L. J. M. C. 198 ; 71 L. T. 403 ; 42 W. R. 637 ; 18 Cox C. C. 15 ; Q. B. D.

[Bray J. : The telegram and the meeting together would be corroboration.]

The main burden of the defence was that there was no corroboration. The learned Commissioner told the jury that if they did not believe Marks there was an end of the matter. The learned judge even misdirected the jury in favour of the prisoner, because he said, " If you come to the conclusion that there was no corroboration here, even though you were certain that every word that Marks said was true, still the law does not allow you to convict on that." That was a misstatement of the law in favour of the prisoner.

[The Lord Chief Justice : The words " Kams did not deny it " may have referred to a previous conversation.]

The Lord Chief Justice : The case is one of very considerable difficulty. The question is whether or not we ought to affirm this conviction. As to the law of the case there is no difficulty. I have nothing to add to the judgment of the Court in *Tate's* case [above, p. 12] as to the practice, and as to the proper direction with regard to the corroboration of witnesses who are accomplices. Mr. Rawlinson does not suggest that in the general direction as to the necessity of corroboration, particularly after the discussion that had taken place, the learned Commissioner misdirected the jury on the question of corroboration. What he does contend is that the judge misdirected the jury either by not properly applying that rule to the evidence, or that by some other misdirection he has practically negatived the contention that there was no case to go to the jury on the ground of want of corroboration. This case brings out in relief the real necessity in the administration of criminal justice that at times, in difficult cases, this Court should have the power to order a new trial. I have called attention to that because from time to time, on rare occasions, it is seen that there are cases in which it would be very desirable

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that there should be further investigation, not so much for the purpose of clearing up difficulties as for the purpose of making it quite clear and plain that an innocent person has not been convicted. The great difficulty that has occurred to us in this case is whether or not in fact there was sufficient evidence of corroboration, and, secondly, whether or not Mr. Rawlinson is right in his contention that the learned judge in his summing-up with regard to one of the important questions in the case, the public-house interview, so withdrew that particular question from the jury that there is ground for contending that there was a miscarriage of justice in that respect. With regard to evidence of corroboration, taking the story as a whole, the Court has no doubt at all that there was corroborating evidence. In this crime undoubtedly there was more than one person engaged. The story of the original case, when Marks was tried, made that perfectly plain. Without referring to the incident in this Court when Marks was appealing, it is common ground that there was more than one person concerned in the fraud. The cheque was presented on the morning of the 13th September. On September 12th a telegram was sent to Marks which led him to telegraph back to Kams. The Court agrees with Mr. Rawlinson's contention that Kams was in no way responsible for the contents of the telegram, and that in no way could the contents of the telegram sent to Marks be evidence against him. It is only important from the point of view of considering whether there was evidence that in fact Kams was an accomplice of Marks, having regard to that which happened afterwards. It is a material fact in the case which was not seriously disputed in the Court below that Marks was intimate with Kams. When the telegram sent in the name of "Alf" was received by Marks he telegraphed back to Kams. Therefore we are on safe ground in assuming that Marks, when he sent back that telegram, intended to make some business arrangement with, or to come up and see Kams. It is not disputed that he came up that night, and that he saw Kams that night. Then arises the controversy between the parties as to whether or not an arrangement was made between Kams and Marks that night that they should meet at some place the next day. On the next day it was said that they did meet—ultimately at a public-house, called "The Wooden Shades," and that there Kams met Marks and two other persons. The Court is of opinion that if there was no meeting at the public-

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house on September 13th there would be very little corroboration, if any, in the circumstances which occurred. But if in pursuance of a telegram originally sent which Marks believed to come from Kams, Marks came up and saw Kams upon the night of September 12th, and an arrangement was made between them that they should meet somewhere for the purpose of business the next day, and they did meet, the Court is clearly of opinion that that would be substantial corroboration of Marks's story, because it was the action taken by Marks immediately preceding the presentation of the cheque at the bank that would show that Marks and Kams were acting in concert for some purpose which is not otherwise explained. No explanation is given of any other business. If, on the other hand, it is to be taken that Kams only had a casual interview with Marks on the night of September 12th, in consequence of some mistaken idea, and that nothing further was done, the Court is clearly of opinion that there would be no corroboration. Was there evidence of that which would be corroboration, namely, a meeting between Kams and Marks in consequence of the telegram and an arrangement made that they should meet? With regard to the first part there is the telegram itself and the coming up to London. Upon the important question, aye or nay, "Was he at the public-house?" there is the evidence of Brown—not, from some points of view, altogether satisfactory. The Court cannot say that this evidence should have been withdrawn from the jury because the way in which Brown identified Kams was not altogether satisfactory. There was the statement of Brown that he had no doubt about Kams. If there was a meeting, Brown's evidence would certainly be corroboration. We then come to the question, did the learned judge so deal with the question as to withdraw it from the jury and misdirect them as to that interview? We are extremely anxious that we should enforce the necessity of care in the summing-up of these difficult cases; and in this case the summing-up does not appear to the Court to be sufficiently full or to be sufficiently precise. There should have been a more critical examination with regard to the interview at the public-house on the morning of the 13th, and possibly a comment upon Brown's position and evidence. But as the Court has had to point out on more than one occasion, they cannot be in the position which the learned judge occupies when summing-up. While we do not think

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the summing-up was altogether satisfactory, before we criticise we ought to remember that there had been lengthened argument by Mr. Muir and Mr. Curtis-Bennett, and full discussion. In his address Mr. Curtis-Bennett strenuously argued before the jury that his client, Kams, was not at the public-house on the morning of the 13th September, and there had been arguments by the learned counsel for the prosecution. If we take the passage on which so much reliance is placed, and which Mr. Rawlinson contended shewed a substantial misdirection, the Court has doubt as to whether the shorthand note was strictly accurate. It is very remarkable that if that passage, "Kams did not deny it," is to be explained as a statement by the learned judge, there was no correction of it, because Kams had not only distinctly denied being at the public-house, but had denied the instructions at the interview which led up to that meeting. It was such a gross misstatement of evidence that we cannot help feeling that it would have been pointed out at once either by counsel for the prosecution or counsel for the defence. The Court very much doubts whether the report is accurate. It must have been understood by the jury as being an expression of the judge's opinion with regard to the result of Kams's evidence. It is unfortunate but at the same time it seems to the Court that it would be going too far to say that there has been a miscarriage of justice or a misdirection in this case because of that particular passage. But the Court has no doubt that the summing-up was addressed to the main contentions of counsel in arguing the case, and they are unable to say that the jury was misled. It was established beyond all question that there were accomplices. There was the evidence of Marks that Kams was an accomplice, though there was necessity for corroboration of Marks. But taking the facts which were established, the Court has no doubt that the jury understood the matter, and is unable to say that there has been any miscarriage of justice. For this reason the appeal must be dismissed.

Appeal dismissed.

Solicitor for the Appellant : *Harry Pfahl.*

ALFRED JONES

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If a person voluntarily parts with goods to another on an undertaking that they will be paid for, and if the purchase-price is not afterwards paid, the person receiving the goods is not necessarily guilty of larceny by means of a trick.

This was an appeal by leave of L. Coleridge J. against a conviction for larceny. Appellant was convicted at the County of London Sessions on December 15th, 1909, and sentenced by the Deputy-Chairman to six months' imprisonment with hard labour.

Percival Clarke for the appellant (under sect. 10 of the Criminal Appeal Act), who was present. On November 18th, the appellant called upon a baker named Rayner and asked him if he would supply him with bread to sell to customers. Rayner asked for cash, but the appellant said he could not pay for it until he received the money from the customers. Rayner asked him for his name and address and a reference. He gave the name and address correctly, and also a genuine reference. On the morning of the next day, the 19th, he returned to Rayner's shop and was handed the bread. He went away, but never returned with the money. That did not amount to larceny. The old form of indictment was "by force of arms," indicating that the accused took the property from the person robbed against his will. If he consented to give it to the man in the belief that he was to be paid for it, whatever intent to defraud might have been in the mind of the prisoner, the crime of larceny had not been committed. Here Rayner voluntarily parted with his property in the bread, which he never expected to see again, and nothing more had occurred than the contracting of a civil debt. As to any intent to defraud it was true that appellant, when arrested, said, "I am not the man." But he explained that he said this because, being publicly accused, he would not give them any satisfaction, and he had given a correct name and address and a genuine reference.

A. D. Hutchinson for the Crown. The question had to be looked at as a whole, which was what the jury did. On the question of credit having been given the appellant's conduct in the transaction must be looked at. If he intended to steal the bread, although he pretended to purchase it, there would be no contract. It would amount to larceny. In *Campbell,* Moody, C. C. 179

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(1827), a prisoner, who had prevailed upon a tradesman to part with goods under the pretence that the price would be paid, although his intention was to get the goods without paying for them, was held to have been guilty of larceny. Mr. Loveland-Loveland had distinctly pointed out to the jury the distinction between a civil debt and a crime.

The Lord Chief Justice : It is important that the distinction between a civil remedy and a criminal offence should be carefully maintained ; that people should not be encouraged to think that they are entitled to treat that which affords good ground for a civil claim as constituting a criminal offence. In this case it cannot be said that the delivery of the bread to the prisoner was obtained by a trick. If there had been anything of that kind it clearly would have been larceny. But it is quite plain that the prisoner did tell the prosecutor that he wanted the bread for sale, and that he could not pay him until he got the money from the customers. Also upon being asked for a reference he honestly gave a reference. Thereupon the prosecutor parted with the possession. *Primâ facie* that is not larceny. The prosecutor parts with possession, meaning the prisoner to have control of the goods for the purpose of sale without payment for a limited time. Unquestionably the bread was given to the prisoner on credit for such period as would permit of the bread being sold. All this took place the day after the original statement had been made. To a certain extent the prosecutor had had time to inquire, which negatives any suggestion of fraud. Unfortunately the man did not pay. When he was taxed, he made an unfortunate statement ; that might have been because of what had passed. Perhaps he thought he was guilty of a criminal offence in not paying. It seems to us that it would not be safe to allow this conviction to stand as one of larceny, and that being the only ground, the conviction must be quashed.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, AND MR. JUSTICE BRAY.

WILLIAM ASTON.

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William Aston.

Extension of time for appeal against conviction as a habitual criminal refused.

This was an appeal from an order of Bray J. refusing extension of time to appeal against conviction for larceny and a sentence of five years' penal servitude and five years' preventive detention as a habitual criminal, at the Worcestershire Quarter Sessions, on October 12th, 1909.

Appellant was not present.

THE LORD CHIEF JUSTICE: It is possible that some question might be raised as to some part of the evidence on which the appellant was convicted of being a habitual criminal. As that conviction would only affect the period of detention, and the Court is of opinion that in any circumstances he would have been found to be a habitual criminal, the Court will not grant the extension of time, especially as the term is entirely within the discretion of the Home Secretary.

Application dismissed.

GEORGE SCOTT.

George Scott.

When the question of guilty knowledge has been properly put before the jury on an indictment for receiving stolen property, the Court will not interfere.

This was an appeal against an order of Bray J. refusing leave to appeal against conviction and sentence of sixteen months' im-

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prisonment with hard labour on the 3rd January, 1910, passed by the Recorder of Dover, for receiving six stolen barrels.

Gathorne Hardy for the applicant (under s. 10 of the Criminal Appeal Act), who was not present. This was a charge of receiving certain oil barrels, and it appears from the evidence that these barrels were such things as might easily be *bonâ fide* in the possession of any man of the labouring class.

Applicant and his emissaries sold various barrels to several respectable firms, on whom no suspicion has ever fallen. Unfortunately applicant has been convicted on several previous occasions—three times for larceny—and this came out before the jury. This operated very seriously in causing suspicion to fall upon the prisoner.

[The Lord Chief Justice: His defence was that he bought them from a man named Darby.]

These circumstances of prejudice distinguished him from the respectable firms who bought these barrels without question. When the Recorder was questioning a detective-constable as to why he would not go back to a certain public-house he said, "I did not like the idea, because we have had a considerable amount of trouble with Scott before." The suggestion all along was that this man was a dangerous type of criminal with whom they had had trouble before.

The great point in his favour is the complete absence of any concealment. The barrels were left for applicant at a railway station. Applicant went to a carter named Newings and asked him to move them to the weighbridge, where they would be in an even more conspicuous position. He then sent a man named Barton to take them to the gasworks in his own name. They were then taken through the town on an open barrow. As to certain barrels charged in the second count, applicant, who was undefended, pointed out at the trial that those particular barrels were not identified as belonging to the prosecutors. Two of the six barrels found at the gasworks might have been taken previously.

When applicant was arrested, and told that Barton was in custody for having stolen barrels in his possession, and had stated

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that Scott had sent him for the barrels, he said, "That's quite right, he was to meet me in the market, if he did not meet me there he was to come down to the pier." On the way to the station he produced a piece of paper, which shewed that he was in daily company with Darby, and said, "I had two off him on the 23rd," and yet the prosecution suggested the secrecy of previous visits from Darby.

[The LORD CHIEF JUSTICE: There were five different persons who swore to people moving barrels early in the morning.]

The evidence was that applicant would get a carter to take them to the weighbridge, and another man to take them through the town.

His explanation was that he had been told by Darby that he had picked them up floating in the sea, and that was a very possible explanation; it was admitted that very often these barrels float away off the piles. Throughout he acted with extraordinary candour.

The LORD CHIEF JUSTICE: There was evidence that the applicant employed different men to move the barrels, and as the Recorder pointed out, they must have been moved several times, and five or six different people were ordered by the applicant to move the barrels, which were afterwards sold for small sums. He did not produce Darby or give sufficient information to enable him to be found. The jury had the case put before them most fairly. There are no grounds whatever for interfering with the conviction.

Application dismissed.

Frederick Charles Davis and Harry Garrett.

FREDERICK CHARLES DAVIS AND HARRY GARRETT.

Conspiracy to defeat the course of justice—Severity of sentence.

This was an appeal by Garrett on questions of law against a conviction for conspiracy to defeat the course of justice, after a trial before Lawrance J. at the Lewes Assizes on December 14th,

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15th, 16th and 17th, 1909, and an appeal from an order of Bray J. refusing leave to appeal against the sentence of eighteen months' imprisonment with hard labour. Davis, who had been convicted at the same time for the same offence, and sentenced to twenty-one months' imprisonment with hard labour, appealed against an order of Bray J. refusing leave to appeal against conviction and sentence.

Sutherland Græme for Garrett (under s. 10 of the Criminal Appeal Act); who was present.

The facts are of some complexity, as the trial lasted four days, and there were four prisoners, Frederick Charles Davis, Pike, Mrs. Pike, and Garrett. Davis was a builder in Bromley, where he had a business. The Corporation of Bromley brought a great number of actions against him, in which he was successful. Eventually, however, he lost one, and was then made bankrupt on the petition of the Woolwich Building Society and the Corporation. From that day Davis, Ridley, and a brother of Davis were alleged to have conspired to forge certain deeds to defeat the creditors of F. C. Davis by giving his property to his family. For this offence F. C. Davis was sentenced to five years' penal servitude, and Ridley to four; the other Davis was acquitted. Davis was sent to Wormwood Scrubbs, and while there was visited by a Mr. Ellis. Davis made certain overtures to Ellis. On the 23rd April last year Davis's appeal in this Court was heard and dismissed. During the hearing of the appeal Ellis saw Davis in or about this Court. Ellis was concerned with Davis in certain building transactions at Bromley, and, according to the prosecution, certain documents were, on April 23rd, handed by Davis to Ellis. The instructions to Ellis (now exhibited) that Davis gave are on the back of a copy of the deposition papers. Ellis was called for the prosecution. Of course, he had no intention of carrying out those instructions. On the 7th July, 1909, Garrett came on the scene. Garrett wrote a letter to Mrs. Davis, in which he tells her that he has had a letter from Davis in Lewes prison. That letter from Davis was never produced, but it was proved by the prison authorities that if written it was not authorised. Garrett's explanation was this: The reference in the letter was to a scheme for prosecuting Ellis and one Edell, a solicitor, for conspiring against him (Davis) and trying to deprive him of his property.

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On the 12th July there was a letter from Davis to his family in which Garrett's name occurs. This again was proved to have been unauthorised. Then later there were two other documents—one a letter purporting to be from a burglar who had broken into Davis's house in 1907. The handwriting was not identified in any way, and there was no reference to Garrett. The next step was that Davis received the burglar's letter, enclosing a deed, which, according to the case of the prosecution, had been made to look dirty. The stamp at the corner was missing. There were allusions to drinking whisky and sleeping in a bed in the room which the burglar said he entered, but the prosecution proved that there was no whisky and no bed, so that it was impossible to sleep there. The Governor sent for Davis, and shewed him the deed. He then made a great theatrical display of joy. The deed was then sent by Davis to his solicitor, Clarke. On the 20th July Davis wrote a letter to his family. It was again unauthorised. Then comes another ramification in a letter to Mrs. Davis through Garrett, signed J. Harris. There was a suggestion that this was Mrs. Pike, 111, Western Road, Lewes. She had forwarded unauthorised letters through Garrett to Davis's wife. Now as far as Garrett is concerned, Garrett's first letter to Mrs. Davis was on July 7th. The suggestion of the prosecution with regard to this letter was that Garrett was taking an active part in working for Davis's release.

The important part in the letter was this : "I have sent him a fountain pen and other things he has asked for," but there was no evidence that a fountain pen had in fact been sent. One of the prison warders, when at the police court, stated that it was impossible for the deed to have been made inside the prison, and Garrett now complains that no reference to that statement was made in the summing-up.

There was also a suggestion that Garrett was to get £200 for his services. In one of his letters he wrote : "I hold I.O.U. for £200, and £5 has been lent since." Now Garrett's answer as to this £200 is that there had been racing transactions between him and Davis, and that he and Davis had a complete settlement, in which Davis owed him £200. Certain letters from Davis were put in by the prosecution, which shewed an anxiety on his part to raise £200 immediately ; and, again, in another letter occurred

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the passage : " Bring Mr. Garrett along, and tell him I want to settle up with him."

Pike admitted that he passed unauthorised letters out. He and his wife were acquitted.

[The Lord Chief Justice : There were a number of documents in Davis's handwriting which were written in prison.]

The point of law raised is that the judge did not put Garrett's case fairly to the jury. There were many points taken on behalf of Garrett which the judge did not put to the jury. Yet since there were many letters admittedly written by Garrett, and the jury had the facts fully before them, therefore so far as the conviction is concerned, no doubt it would be difficult to succeed in an appeal, having regard to the proviso in s. 4 (1) of the Criminal Appeal Act.

With regard to the sentence, Garrett is a man of 51 years of age. Inspector Maclean said that he had been in the employment of one firm for twenty-one years. He was employed to travel and to get orders for pictures. Further, there were three witnesses as to character. It is right to say regarding the sentence that the learned judge stated that but for the strong recommendation to mercy from the jury he would have given him the same sentence as Davis. There was thus a recommendation to mercy, and also previous good character. The jury were absent for a considerable time. Yet the learned judge put them on nearly the same footing, although Davis had been previously convicted of doing practically the same thing. It was disclosed that Davis had got a good many other people in Lewes prison into trouble. Davis took the leading part in the conspiracy. He wrote the first letter to Garrett. Garrett, in fact, got nothing out of the crime. The £200 was never paid. He is a married man with two children, both cripples, and his previous employers have written to his solicitors that they would take him back if his sentence were reduced.

[The Lord Chief Justice : Did not Garrett write claiming the £200 ?]

Yes, but it was in reply to a letter from Edell.

R. T. Muir for the Crown was not called upon

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The Lord Chief Justice: In this case Davis appeals against his conviction and asks for leave to appeal against his sentence. While serving a term of penal servitude for forgery he manufactured or arranged to have manufactured a false deed intended to be used by him as a proof of his innocence of the crime which led to his original conviction. The evidence of his guilt was overwhelming, and the offence of a most serious character. As far as the sentence is concerned, we think that the imposition of an even longer term of imprisonment would not have been considered too severe. Davis's appeal and application will be dismissed.

Garrett's appeal was based, first, upon a question of law, namely, that many of the points raised in his defence were not put clearly before the jury. The summing-up was long and careful, and counsel does not now suggest that the jury could not reasonably come to the conclusion that Garrett was taking an active part in attempting to procure the release of Davis.

It was, next, contended that the sentence imposed upon Garrett was unduly severe, having regard to that passed upon Davis. We were asked to treat the sentence upon Davis as the standard, and to fix Garrett's sentence according to that standard. We cannot accede to that argument, holding, as we do, the view that a longer sentence might well have been imposed upon Davis. Whether or not Garrett was actually concerned in the making of the false deed, the letters written by him and delivered through his agency, as well as the claim for £200, shew that upon the evidence he was actively engaged in a conspiracy for the benefit of Davis. In these circumstances we cannot say that the sentence passed upon him was excessive, and the appeals will be dismissed. The sentence will run from last Friday.

Appeals and application dismissed.

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Robert Dench.

ROBERT DENCH.

As a general rule, penal servitude ought not to be inflicted for a first offence.

This was an appeal by leave of Bray J. against a sentence of three years' penal servitude for larceny, inflicted by the Chairman, Sir W. Grantham, at the East Sussex Quarter Sessions on January 4th, 1910.

Appellant in person.

W. W. Grantham for the Crown. This was a case of systematic thieving on a railway which had been going on for several months. Goods to the value of £300 had been taken, and suspicion had fallen on many other servants of the company. The company were put to great expense in ascertaining the real criminals. Goods trains were stopped by signal in the ordinary way, to let fast trains pass, the thieves got into the trucks and took out the goods. It is true that appellant had an excellent character, and had not been convicted for either poaching or anything else.

[The Lord Chief Justice: He admitted with regard to poaching that he had been doing something illegal on the night the policeman saw him and Denman with the stolen hams.]

The value of the property found in Dench's house was practically nothing. But he gave Allen, one of the other incriminated men, a warning to destroy the stolen property in his possession.

[The Lord Chief Justice: Does it increase the gravity of the offence that he should have tried to give his accomplice a warning? There was no evidence that he did do so.]

It is about twelve months since the thefts first began.

[The Lord Chief Justice: What did the learned Chairman say in sentencing Dench?]

"You, Dench, have not been convicted before, but you had in your possession a catapult and sixteen stone bullets, and you said you had been shooting birds that night . . . . and no doubt

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you have been a poacher. . . . I have got to make an example of you, it is a very serious case indeed."

"Denman and Dench, when discovered by a constable carrying the stolen hams, went and told Allen to get rid of the stolen property in his house. As most of the property was found on Allen, I am obliged to give him a more severe sentence."

The Lord Chief Justice: With regard to this sentence we feel a great deal of difficulty. The thefts had gone on for a considerable time, and they were hard to detect. They were committed when the train stopped on the line waiting for the signal. Now from the point of view of the gravity of the offence, it is one in which the tribunal is justified in dealing with it as a serious crime, for there was evidence that this man had been implicated in the robberies for some time. There was evidence of his connection with previous thefts of this sort, but on the other hand he had not been previously convicted, and he was an industrious man. He was tempted by the facility of getting things for himself and his family. The circumstance that there were found upon him at the time of his arrest implements that may have been used for poaching is not a matter which ought to have been taken into consideration. It certainly does appear from the statement made by the learned Chairman when sentencing the prisoner that that was taken into consideration. In the circumstances it seems to us that to inflict three years' penal servitude for a first offence is to proceed on a principle which the Court is not willing to indorse. We are aware that the learned Chairman is a judge of great experience, and his sentences have always been conspicuously fair and just. At the same time the Court is bound to exercise its discretion. The principle of inflicting penal servitude for a first offence can only be justified in very special circumstances. The sentence must be reduced to one of eighteen months' imprisonment with hard labour from the date of the conviction.

Sentence reduced.

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Horatio Buckland.

HORATIO BUCKLAND.

If on an indictment for obtaining money by false pretences, fraud is proved against the appellant, even though it is not strictly a false pretence in law, the Court will apply the proviso to sect. 4 (1) *of the Criminal Appeal Act.*

Appeals against sentence must be formally argued.

This was an appeal by leave of Bray J. against a conviction for obtaining money by false pretences, before the Chairman of the Berkshire Quarter Sessions (R. B. D. Acland, Esq., K.C.) on January 3rd, 1910, and a sentence of three years' penal servitude.

Litt for the appellant (under s. 10 of the Criminal Appeal Act), who was not present.

Appellant, who was undefended, was charged with obtaining £7 by false pretences from one Payne, who had advertised in the *Daily Mail* and the *Exchange and Mart* for a saw-bench. The first alleged false pretence was a letter from appellant to prosecutor written on the 2nd October, 1908, and addressed from Barking, London, the material parts of which were as follows: "I can offer you a saw-bench for £10. This price includes bench with a loose pulley. Terms, 50 per cent. with order. Delivery will take about four days to your station. The saw-bench is lying at Blackburn." A further false pretence was alleged in a letter of the 12th October from appellant to the prosecutor, the material parts of which were as follows: "Yours to hand of the 5th, offering £7 for saw-bench. I guarantee it to be in perfect condition, and true in every respect. Terms as per letter of the 2nd instant." There was no evidence of the falsity of the statements in these two letters, nor that he did not have a saw-bench under his control.

[The Lord Chief Justice: He sent a very full account of a specific sawbench.]

The prosecution should have established either (a) that he was not the owner of a saw-bench at all, or (b) that there was no saw-bench at all under his control at Blackburn. As to (a) he never said he owned one, and as to (b) enquiries should have been made at Blackburn. It was not sufficient to make enquiries from the railway company.

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[The LORD CHIEF JUSTICE : Your point is that it is a pretence as to some future act, and not as to a present one. The letter said, "I will deliver for £7." Is not this equivalent to saying that he is in a position to deliver ? Is it not a false statement if the man never meant to deliver ? Does it not come under *Bancroft's* case. 3 Cr. App. R. 16; 26 T. L. R. 10 (1909)?]

This case should be distinguished from *Bancroft,* in which it was proved that no directory was in fact published. The learned Chairman was wrong in directing the jury that if they were of opinion that appellant had a saw-bench in his possession at the time, and did not intend to deliver it at Bracknell, that was also a false pretence. Again, they were asked : "If he ever had one over which he had control, do you think he really intended to send it to Mr. Payne ?" This is equivalent to telling the jury to infer a guilty act from a guilty mind.

There is also an appeal against the sentence. Appellant was recommended to mercy by the jury, and had been in gaol for two months before trial ; only a trivial amount of money had been obtained.

Sturges for the Crown was not called upon.

The LORD CHIEF JUSTICE : If this case depended on the passage in the summing-up running, "If you are of opinion that he had a saw-bench in his possession at the time and did not intend to deliver it at Bracknell, that is also a false pretence," and if that was all the jury were told on the point, the matter might require further consideration. It goes further than *Bancroft's* case, because there the man was not in a position to do what he had promised to do. But, as we have often said, one ought not to criticise a particular sentence unless you can say it may have misled the jury. Now the facts in this case were that appellant, having stated that he had a saw-bench at Blackburn, and that it would be delivered carriage paid at Bracknell, and having acted in a manner calculated to make anyone believe that he had a saw-bench, kept the money for a year without making any effort to account for his mistake or deliver the bench. The sentence in question could not really have affected the verdict of the jury. And even if this technical point

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were answered in favour of the appellant, still the Court is of opinion that there has been no substantial miscarriage of justice. Appellant was on ticket-of-leave. The sentence will remain the same.

We may add—without reference to this case—that if it is desired to press an appeal against a sentence, counsel must argue against it fully, and not merely state the bare facts.

Appeal dismissed.

Harry Bloom.

HARRY BLOOM.

Misdirection—When a man is jointly indicted with his paramour for stealing the goods of her husband at or about the time of her leaving the latter, the jury must be clearly directed as to the proof of his guilty knowledge, and should not have topics of prejudice connected with his immorality addressed to them.

This was an appeal by leave of Bray J. against a conviction for larceny, at the Pembroke County Quarter Sessions on January 4th, 1910. Appellant was sentenced to six months' imprisonment with hard labour by the acting Chairman.

Ivor Bowen for the appellant (under s. 10 of the Criminal Appeal Act), who was not present.

Appellant was charged with a married woman, Mrs. Colbourn (who was convicted and bound over to come up for judgment within twelve months if called upon) for jointly stealing the property of her husband. There was no count for receiving, and there could be none since *Streeter,* 1900, 2 Q. B. 601; 69 L. J. Q. B. 915; 83 L. T. 288; 64 J. P. 537; 19 Cox C. C. 570; C. C. R.

The charge was confined to stealing a ring and articles of household use. Prosecutor was a dentist, and sent his wife and family to Neyland, near Milford Haven, and he used to join her at the end of the week, and then return to Swansea. Appellant had been lodging with them, and he went down in November. The evidence is that she declined to return to her husband's house at Swansea, though she was willing to go anywhere else and live with

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him. On the 13th December the husband found that the wife had gone with the family and appellant to Rosslare. He followed and there found the luggage of the wife in the cloakroom labelled under the name of Blake, which was sometimes used by Bloom. At Wexford he found the wife and children at a hotel; appellant was staying at another hotel there. The husband took the children back to Swansea and gave information to the police. On the 24th December the police arrested Bloom and the wife at Cardiff, and there were found in their possession a diamond ring, which the prisoner was wearing, three counterpanes, and numerous other household articles. The woman then said: "I have stolen nothing. I have worked for all I have taken." She added that the husband had given the ring to her and that she had lent it to appellant. My case is that the proper questions were not left to the jury. I submit that in a case of this kind the prosecution must prove a joint taking, and a fraudulent intention at the time—that is to say, that when the wife stole the property he, Bloom, knew she had stolen the property, and that he was a party to the theft.

[Bray J.: A wife may lawfully be in possession of the property of her husband.

Darling J.: If she gave the ring to appellant he could still steal it. Suppose she carries away something belonging to her husband.]

But if she simply takes the ring away and gives it to a man afterwards, that is not sufficient evidence of larceny against him.

[Darling J.: Suppose she wears it, it is still her husband's ing.

Bray J.: There is no suggestion here that appellant took it gainst her will.]

I rely on *Featherstone*, Dears. & P. C. C. 369; 23 L. J. M. C. 127; 2 C. L. R. 774; 18 Jur. 538; 6 Cox C. C. 376 (1854).

There must be a felonious act, a joint taking by the man himself. He must equally participate in the taking. The

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prosecution must prove that in cases of this kind the man must have known that when she eloped she was taking the things with a felonious intention from the outset. See *Tolfree*, 1 Moo. C. C. 243 (1829); *Berry*, Bell C. C. 95; 28 L. J. M. C. 70 ; 5 Jur. N. S. 228 ; 8 Cox C. C. 117 (1859) ; and *Rosenberg*, 1 Cox C. C. 21 ; 1 C. & K. 233 (1843). An adulterer is not guilty unless the goods consist of other things than her wearing apparel. There must be a personal act of taking by the prisoner or separate possession by him. The prosecution must prove that on the 13th December this man knew that she was taking goods of her husband in circumstances amounting to a felony. Now what did the woman say on arrest ? " They belong to me as well as to him," and if she had reasonable grounds for believing they did belong to her there was no larceny.

[The Lord Chief Justice : You must not overlook the point of separate possession.]

I say that in this case it was absolutely clear that there was no guilty knowledge proved against appellant.

Nobody appears to have taken care of the prisoner's interests except the clerk of the Court. She went on : " The ring was given me by my husband many years ago. The clock was given me while I was in hospital. The razor was taken by mistake. The ten pounds was given me with no definite instructions as to its use The bedclothes are mine."

Appellant said : " I saw her wearing a ring. She only lent it to me. I did not know it to be a gentleman's ring. I had seen her wearing it. When she was going away from Neyland she told me that everything was her personal property." I will read the summing-up. The Chairman says : " The facts are very simple ; it is a sordid and discreditable case. A husband and wife who seem to have been living happily together were separated by the intrigues of the man who has just given his evidence. There is no doubt husband and wife came to Neyland apparently happy. as husband and wife should be, and each left Neyland separately —a ruined house and home. However, that is not the question you have to try. As reasonable men, you have to consider whether this man was not the owner, as any husband would be, of the property used by them both. If that is so, the property was his, and

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when the things were taken away the property remained his, and if your view is that the property was Mr. Colbourn's, you can have no possible difficulty in coming to an opinion that it was very improperly taken away. They have been charged with receiving property, and if you believe that the property of the husband was taken away against his consent, you have only one verdict possible."

[Bray J.: He did not leave to the jury whether the prisoner knew or not that the things had been stolen.]

No. He goes on: "You have heard what the male prisoner has said in his defence, and of course you can give what credence to it you like. He seems to think that by some hocus-pocus the husband had packed up his articles and the wife hers. If you believe that, it will not be difficult to find for the defence. But as reasonable Welshmen, and as many of you are fathers of homes and masters of houses, you must consider whether this is a reasonable suggestion or not."

I say that that is not a proper way of leaving it to the jury. See *Flatman*, 14 Cox C. C. 396; 42 L. T. 159; 44 J. P. 314 (1880); C. C. R. Further, there is no definite evidence when they left Neyland. The evidence of their meeting was in November, before the time of this charge.

[Bray J.: The attention of the jury was not called to this.]

These questions should have been asked—(1) Did the prisoner know that it was the husband's property? (2) Did he assist in the actual theft?

[Bray J.: And the Chairman begins with something which is pure prejudice—"You have led away a silly and infatuated woman."]

If properly directed the jury might reasonably have acquitted the man.

Bowen Davies for the Crown. The question for the jury was whether they could infer from the facts that the man knew the

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goods were the property of the husband. He knew that this woman was a married woman and had lived with her husband at Neyland. Besides he saw the initials T. C. on the travelling basket. He admitted that the property was found to have been labelled in the name of Blake, which is the stage name of the prisoner. He was found wearing a diamond ring which was the property of the prosecutor. As to whether that question was not properly put, I submit that it was not necessary to put it to the jury. If a man runs away with another man's wife he does so at his peril. *Featherstone*, 23 L. J. M. C. 127, where Lord Campbell says that if a wife commits adultery "she thereby determines her quality of wife."

[The LORD CHIEF JUSTICE: Is it not consistent with appellant's innocence that the husband had given them to the wife?

DARLING J.: How could he be her accomplice unless he knew they were stolen? Suppose simply that this woman had stolen some goods and handed them to Bloom, you would have to shew that he knew something. In *Featherstone* the jury were told so in clear language. See the report in Cox C. C.

The LORD CHIEF JUSTICE: Does the summing-up sufficiently point out to the jury that the man must have guilty knowledge? What is the evidence that the man did know?]

The fact that the basket had the initials T. C., and that these were the initials of the husband.

The general rule of law is that a wife cannot be convicted of stealing her husband's goods, but this rule is qualified when she is eloping with an adulterer. An adulterer cannot be allowed to set up his elopement as a defence when he knows goods were taken away without the consent of her husband.

I cannot prove by any direct evidence that this man knew they were stolen, and therefore it was a question for the jury.

Ivor Bowen, in reply, cited *Max Cohen*, 2 Cr. App. R. 207; 73 J. P. 352 (1909): "There is such a miscarriage of justice not only where the Court comes to the conclusion that the verdict of

guilty was wrong, but also when it is of opinion that the mistake of fact or omission on the part of the judge may reasonably be considered to have brought about that verdict."

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The Lord Chief Justice : In this case we have a strong illustration of what we have had to observe many times, viz.:—the importance that this Court should have power to order a new trial. It is impossible for the Court properly to perform its duties without that power. In this case certainly we do not wish anything to be understood to justify the suggestion that where a woman has taken away the goods of her husband, the ordinary rule of law should not be enforced, when they are afterwards found in the possession of the man with whom she ran away. The Court does not desire to assist people to escape the consequences of their immoral conduct, but we must not consider this case from that point of view. We have to direct our minds to the question whether or not the acting Chairman has sufficiently directed the jury in this difficult case. The Court would be loth to interfere if it could find in the summing-up anything to indicate to the jury that they ought, before they convicted, to be satisfied that the man knew the ring to be the property of the husband when he wore it, or that he was a party to the actual taking when the wife took it. Remembering that this appellant was not defended, and that he was charged with stealing, certain material things should have been pointed out. We express no opinion as to what the verdict of the jury should have been. The summing-up began by saying that it was "a sordid case, and a very discreditable one." That may be perfectly true, but it is not likely to lead the jury to consider the exact questions that they had to decide. [The Lord Chief Justice read the passages of the summing-up set out above.] It is impossible to say that this is sufficient direction to the jury that they must be satisfied of one of two things: either that appellant was party to the stealing, or that he had taken separate possession.

In these circumstances it does seem to the Court that this is not a satisfactory trial. The Court should have given a direction to the effect that the prisoner must have been a party to the stealing either when the things were taken away or afterwards. If the Court could find that there had been a direction to the jury which

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was a right direction, even though there may have been some observations as to the moral conduct of the appellant, or if it could see that there was substantial evidence that this man was a party to the stealing, or took the ring away meaning to deprive her husband of it, it might come to a different conclusion. As it is, we cannot say that the evidence before us is such as to shew clearly that with a proper direction the jury on the facts would have decided against the prisoner. Therefore the conviction must be quashed.

Conviction quashed.

Walter James Hadley.

WALTER JAMES HADLEY.

Severity of sentence—Habitual criminal.

This was an appeal by leave of Bray J. against a conviction before the Chairman of the East Kent Quarter Sessions on the 15th January, 1910, for obtaining money by false pretences. There were also applications for leave to appeal against a conviction as a habitual criminal, and an appeal against the sentences of three years' penal servitude and five years' preventive detention.

P. Methven for the appellant (under s. 10 of the Criminal Appeal Act), who was present.

The appellant was charged with obtaining from a man named Huckstepp two sums of two shillings and twelve shillings and some food by means of the false pretence that he was a foreman of the National Telephone Company near Romney, and required money for the purpose of hauling poles. The facts proved constituted, if any, the offence of obtaining credit by fraud under the Debtors Act, and it was not put to the jury at all whether appellant had obtained credit by fraud other than false pretences, or that there was any distinction between the two offences. The maximum penalty for an offence under the Debtors Act was a year's imprisonment with hard labour. The appellant was not indicted under that Act, though such a count is common form in these cases. Mrs. Huckstepp swore that appellant had stated that he was employed on the telephone line between Lydd and

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New Romney, and had been told to get men to work for him at six shillings a day. Bufton, an official of the National Telephone Company, swore that prisoner was not in the employment of his company. He also admitted that the line between Lydd and New Romney was not the National Company's, but that of the Post Office. This was evidence that appellant did not make the alleged false pretence, or use the word National. Further, no evidence was called to prove that he was not in the employment of the Post Office.

A further ground for complaint is the suggestion of Lord Harris, the Chairman, that the jury could find him guilty for holding out hopes of employment. Holding out hopes of employment cannot amount to a false pretence. Now, Huckstepp swore that what influenced him was (a) appellant's employment by the National Telephone Company, (b) that the appellant had anticipation of getting good employment for him (the prosecutor) at six shillings a day.

The question to be decided was what was the influencing cause on the mind of the man who parted with his money. Was it the statement that appellant was employed by the National Company or, as is submitted, the promise that he would provide him with work ? The fact that these two points were confused into one statement by the Chairman is a matter of complaint. It should have been pointed out to the jury that to constitute a false pretence there must be a false statement of an existing fact. The statement about future employment was no false pretence.

[The Lord Chief Justice : You must not assume that to hold out hope of employment may not be a false pretence.]

There was only one false pretence alleged in the indictment, and holding out the hope of employment was not mentioned, yet, though the jury had not to decide it, this matter of a false pretence by appellant with regard to finding employment for prosecutor was "rubbed into" the jury. The other point is that the prosecution did not prove that the alleged pretence was substantially false. Bufton, who was the National Company's agent at Romney, said that many years ago appellant was indirectly connected with the company. Bufton also said that he knew

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nothing about who was or was not employed on the line between New Romney and Lydd, which did not belong to his company.

The prosecution did not prove that appellant was not employed on the line between New Romney and Lydd.

The prosecutor, moreover, says, "I lent him the money because I believed he had told me the truth, and was working for the National Telephone Company."

That suggestion must be qualified by the fact that, as appears from the cross-examination of the prosecutor, the appellant was first asked by the prosecutor whether he had any money, and answered "No." It was only then that he was given the two shillings on October 27th. Prosecutor was to have been paid back all his money when a registered letter arrived. The statement about the registered letter was not charged as a false pretence. There was also no suggestion of any connection between getting the money and the false pretence alleged that he wanted money for the haulage of poles.

With regard to the application to call further evidence, it is desired to call a man named Charles Wood, who heard the conversation between appellant and Mrs. Huckstepp, and is a disinterested witness.

With regard to his conviction as a habitual criminal, it is desired to call witnesses to prove that he was not leading a persistently dishonest life. Appellant had not the means to enable him to call these witnesses at the trial. The witness Harris will, according to appellant, prove that appellant came to him on the 11th April seeking employment, telling him he was a discharged criminal wanting honest work, and that he sent him to various houses where there was a considerable amount of pawnable property. Appellant only left because work was slack, and not, as the police alleged, in order to commit crimes.

[The Lord Chief Justice: He was sentenced to three years penal servitude in 1905, three months' imprisonment in 1908, and three months' imprisonment in July, 1909, apart from two summary convictions in 1900, one in 1902, and five in 1905.

Darling J.: You ask us to say that he is not leading a persistently dishonest life if in the interstices of imprisonment he does some honest work.]

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Shore will prove that after leaving Harris, appellant endeavoured to carry on a business on his own account, and did work at Shore's residence, and Superintendent Jennings that he has been interviewed by several gentlemen and tradesmen who knew appellant and said that he was trying to lead an honest life.

With regard to the summing-up, the Chairman did not put clearly before them what a habitual criminal was, but merely read the section of the Act to the jury. He should have pointed out that the whole thing was not within the four corners of a list of convictions.

L. S. Fletcher, for the Crown, was only called upon as to the application for leave to call further evidence as to appellant's mode of life. It is not incumbent on the prosecution to call evidence except with regard to previous convictions.

DARLING J.: We will deal first with the sentence of three years' penal servitude and five years' preventive detention as a habitual criminal. As to the latter question the proper evidence was given, and the Chairman read the section of the Act, which is not a difficult one to understand. Appellant now desires to call evidence to shew that he is not a habitual criminal. Yet he has been convicted seven times of this very offence, and been sentenced to periods of imprisonment which leave small gaps between the offences. He now desires to call evidence to shew that in the gaps he was leading an honest life, yet it appears that at those times he was observing the houses which he visited to see whether they contained valuables or not. To be a habitual criminal it is not necessary that the man should never do anything honest. Even a habitual drunkard is occasionally sober. The appellant was apparently considering, in these intervals, how to commit crimes again.

With regard to the conviction, he was charged with pretending to be a foreman in the employment of the National Telephone Company, and saying that he wanted money for the haulage of poles. It was proved that he made this pretence. It may be that some of the money and food was also obtained for another reason, namely, the prospect of his finding the prosecutor employment. But it certainly is not a reason against a false pretence being proved, to say that another false pretence was made

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at the same time with it. Nobody except a lawyer splits the language used up into its actual parts. The fact that in parting with his money the prosecutor had an extra reason is immaterial. The prosecutor and his wife say that they were led to give money and food on the supposition that he was in the employment of the National Telephone Company, and was in a position to get the prosecutor employment at six shillings a day. The evidence is that the prisoner stated that he had been at work between New Romney and Lydd, and that he had already asked two men to work for him, and that they had refused because of the wet weather. Appellant said, "Come in the morning and I will give you six shillings a day." It is perfectly clear that this represented that he was at the time in a position to give him six shillings a day. You may prove this by words which in their form refer to the future, so long as these words amount to a representation that the prisoner was then in a position to do that which he promised to do.

Appeals and applications dismissed.

William David Pearson.

WILLIAM DAVID PEARSON.

The gist of the offence of entering a dwelling-house in the night, under 24 & 25 Vict. c. 96, s. 54, the Larceny Act, 1861, is a felonious intent.

This was an appeal, by leave of Bray J., against a conviction for feloniously entering a dwelling-house, at the Bucks Quarter Sessions on January 3rd, 1910, when appellant was sentenced to four months' imprisonment with hard labour.

The Lord Chief Justice: Appellant asked that another charge might be taken into consideration. It is very difficult for us to deal with this alone.

C. Douglas Pennant for the appellant (under s. 10 of the Criminal Appeal Act), who was present. That request is no bar to this appeal. There was no other indictment preferred, so that appellant can still be tried on the other charge, which was not brought

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to the notice of the Court till after the verdict. The facts of this case were as follows. Prosecutrix left her house at 9.40 in the evening, shutting, but not locking, the door, and leaving her husband upstairs. During her absence, which was from seven to ten minutes, appellant entered the house. On returning, she found the front door was not closed, and on going into the dark room where her daughter was, she touched appellant in reaching for some matches. He was sitting in an armchair by the fireplace. She went out to call a neighbour, and when she came back, so far from having escaped, he absolutely refused to move. They then set a dog on him, but with no effect. The Chairman, too, ought to have warned the jury against a statement made by appellant to the constable, which the constable, unasked, repeated : " It is not a serious case, but my previous convictions will be against me."

[The Lord Chief Justice : That statement is not inadmissible, because those were appellant's words, but still, the jury ought to have been warned.]

Appellant's case is that he merely went in for rest. He stole nothing, though he had ample opportunity to steal and to get away. It is clear there was no felonious intent, and the jury ought to have been so directed.

Harold Russell, for the Crown, could not argue that there was evidence of a felonious intent.

Bray J. : In this case the gist is the felonious intention. There is really nothing in the evidence either of the husband or the wife to prove that appellant had any felonious intention. His behaviour when he was asked to go is in his favour. He did not go, but said, " I will stop." The conviction must be quashed. With regard to his being asked by the Chairman as to whether he would like to have " a clean sheet," we express no opinion whatever as to what should be done.

Conviction quashed

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William Syers.

WILLIAM SYERS.

A conviction will not be quashed on the ground of inaccuracies in the summing-up, if there is no actual misdirection, and the case is fairly left to the jury.

This was an appeal by leave of Bray J. against a conviction at the Derbyshire Quarter Sessions on January 6th, 1910, when appellant was sentenced to eighteen months' imprisonment with hard labour for obtaining money by false pretences.

Dyer for the appellant (under s. 10 of the Court of Criminal Appeal Act), who was present.

Appellant was charged with obtaining five shillings from Margaret Sutherland, by making these false pretences :

(a) That he was the director or manager of a coal agency.

(b) That he had in his pocket a good cheque for £5.

(c) That he was managing director of an insurance company.

As to (a) there was no evidence that appellant made this statement or that it was untrue. With regard to (c) appellant had been interested in a concern known first as the English Legal Corporation, and subsequently the English Provident Insurance Corporation, which in October, 1909, he had tried to sell to one Miller. Miller said that the company was really defunct, and the case for the prosecution was that it was a bogus company, because no meeting had been held, and it had not been properly registered, in contravention of s. 65 of the Companies (Consolidation) Act, 1908.

[The Lord Chief Justice : The company is still existing unless certain steps are taken under s. 242 of that Act to wind it up. It would be too much to say that there was here a false pretence merely because the statutory meeting had not been held.]

At any rate, this third pretence was never negatived, and it was not that which induced the prosecutrix to part with her money. Her story is as follows : " At 4.45 he called and asked to see me. I went into the shop. He said that one of the directors of his insurance company had died rather suddenly, and he could not have his cheque forwarded till a new director was appointed, as the cheque had to be signed by two directors and the

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secretary, and that in the meanwhile he was short of money. He said he had a cheque for £5, and that, being a stranger in Matlock, it was not easy to get a cheque cashed. I was induced to lend him five shillings because I thought he was a good Christian man, and believed him after he said he could not get his cheque cashed. I also believed that he had a private cheque of his own in his pocket for £5, and that he was managing director of an insurance company."

With regard to the cheque for £5, it was drawn on Lloyd's Bank at Derby, where it is admitted that appellant had had no account since March, 1908. It is, on the other hand, true that a director of the insurance company had died, and that appellant had not been able to obtain money on a cheque at the United Counties Bank belonging to this company, because he had not been able to procure the signature of another director. It is a matter of complaint that the Chairman never made it clear to the jury that these two cheques were distinct, but allowed them to be confused in their minds. That, however, the woman relied on the insurance cheque is evident from the answer, "I believed a cheque was due to you from the insurance company." That cheque was therefore the inducement.

[The Lord Chief Justice: You must add her other answer when asked "And you also relied upon the cheque for £5?" "Yes, I did."]

The Chairman, in his summing-up, said, with regard to the insurance company, "As a matter of fact, undoubtedly these companies have never been properly registered, and really never had any existence, so that it was a false pretence to say that he was director or secretary of a company which never had existed." That was the only false pretence with which the Chairman dealt, and even as to that he was inaccurate.

Tinsley for the Crown. There was evidence before the jury that this man said that he had a £5 note in his pocket, and could not cash it because he was unknown at Matlock.

The Lord Chief Justice: The summing-up was insufficient and unsatisfactory, but there was no actual misdirection. The

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banking account on which the appellant's cheque was drawn had been closed for the last eighteen months. In these circumstances it is quite plain that it was left to the jury as an ordinary case. It is said that the prosecutrix advanced the money on the strength of the cheque which the appellant said he expected from the insurance company, but when re-examined she again said that she gave him the money because he had on him a cheque for five pounds. What was said about the company had really nothing whatever to do with that part of the case. There is no ground for saying that the conviction is wrong.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE RIDLEY AND MR. JUSTICE DARLING.

GEORGE THOMPSON.

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A statement by a prisoner incriminating a co-prisoner, but denied by the latter when brought to his notice, is admissible in evidence against him on their trial (a)—The ruling of Hawkins, J., to the contrary in Smith, 18 *Cox C. C.* 470; 61 *J. P.* 120 (1897), *overruled.*

This was an appeal by leave of Bray J. against a conviction for burglary at the Derbyshire Quarter Sessions on January 6th, 1910. Appellant was sentenced to seven years' penal servitude.

H. T. Wright for the appellant (under s. 10 of the Criminal Appeal Act), who was present. Appellant was indicted with another man named Archer, who pleaded guilty. When charged, Archer made a voluntary statement to a policeman to the effect that when appellant had come out of Dartmoor prison he had approached him (Archer) and that he and appellant had then committed together a series of burglaries, including the one charged. This statement was afterwards written out, and he signed it. Subsequently, when both were charged together, the policeman, having cautioned them in the usual way, read out that statement, when appellant immediately said, "This is a pack of lies." It is submitted that this statement is inadmissible by reason of appellant's denial. The Chairman was at first in favour of this view.

[DARLING J.: What was said is admissible because appellant had an opportunity of admitting or denying it. Otherwise how

(a) But cf. *Pearson*, 1 Cr. Ap. R. at 78 (1908).

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can one decide whether the question is or is not admissible, if all one knows is that somebody said something in a prisoner's presence ?

[The Lord Chief Justice : I have no doubt as to its admissibility. The question is how the Chairman dealt with it.]

He did, in fact, tell the jury Archer's evidence needed corroboration. But it is submitted that the mischief is very serious. This statement was to the effect that appellant was implicated in other burglaries. And then Archer himself was called. The mischief goes even further than usual in this case, because it shews appellant had been previously convicted, as, for instance, in the passage, "he told me how my brother in Dartmoor was getting on, and said that my brother had told him I could put him on to a job or two." That is quite apart from the details of previous joint burglaries.

[The Lord Chief Justice : Can you suggest that it is inadmissible, because here Archer, in the prisoner's presence, had said, "It is true; why don't you own up like a man?" ? Of course it needs corroboration, but how can you say it is not admissible ?]

I rely on the dictum of Hawkins J. in *Smith*, 18 Cox C. C. at p. 471; 61 J. P. 120 (1897), to the effect that a statement is inadmissible unless the prisoner substantially admits the truth of the whole or some portion of it.

[Darling J. : He does not explain how the judge is to know what the answer is going to be. The narrator may be an additional witness.]

Moresby White, for the Crown, cited *Bromhead*, 71 J. P. 103 (1907) : C. C. R.

[The Lord Chief Justice : That case is to the point : if the jury are told in plain language "you are not to believe a word of that statement simply because it *is* made, but you are to use your own judgment about it," that is a proper direction, and that is what the Chairman here said.]

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Wright: In the case of *Bromhead* the prisoner was silent. A further point is that if Archer was going to be called his statement should not have been read first.

Moresby White was not called upon.

The Lord Chief Justice: In this case the ground of the appeal is that at the outset of the proceedings a statement by the prisoner Archer, who had pleaded guilty, was read. That his evidence required corroboration is clear beyond doubt. I express no opinion as to the precise stage at which a statement of this kind could be referred to in the evidence. It all depends on the way in which the case has been conducted. There may well be occasions in which such a statement cannot be tendered until other evidence has been given. If *Smith* lays down the contrary, that case goes a great deal too far.

In many cases the judge will not know what the prisoner's replies are going to be. The only question which might arise in this case is what is the best stage of the case at which to tender it. But that has nothing to do with the question of admissibility. It would no doubt have been better to say at first, "What did the prisoner say?" and if that had been done it could not have been excluded. The chairman, moreover, cautioned the jury against accepting the statement without corroboration, both at the time when it was put in evidence and in his summing-up. All that can be said is that the statement came in at a somewhat earlier stage than it should have, but in view of Archer's evidence, that was immaterial. We absolutely decline to accept the dictum in *Smith*. Subject to a proper direction that such a statement is not evidence against the prisoner of the facts stated therein, it is quite admissible.

Appeal dismissed.

GEORGE DAVIES.

George Davies.

Severity of sentence.

This was an appeal by leave of Bray J. against a sentence of five years' penal servitude for felonious woundings passed by

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Jelf J. at the Shropshire Assizes on November 8th, 1909. The facts are set out sufficiently in the judgment of the Lord Chief Justice.

Appellant in person : I had no intention of doing any harm.

Alexander Graham, for the Crown, was not called upon.

The Lord Chief Justice : In this case leave has been granted extending the time to appeal against sentence. It is true that when appellant committed the crime he was under the influence of drink, but he is evidently a very dangerous and violent man. It is clear upon the evidence that even before the constable came up he had used the most threatening language. Another most important thing is that the man who was stabbed is a police-constable. It is important to protect police-constables in the execution of their duties. Even a man of good character would have merited a severe sentence. But appellant has, as a matter of fact, been previously convicted thirteen times—twice for unlawful wounding.

Appeal dismissed.

Benjamin Smith.

BENJAMIN SMITH.

Severity of sentence mitigated in view of a period of good behaviour since release from prison (a).

This was an appeal by leave of Bray J. against a sentence of five years' penal servitude for embezzlement, passed by the Chairman of the Northamptonshire Quarter Sessions on January 6th, 1910.

Appellant pleaded guilty to embezzling two sums, 4*s.* and 2*s.* 9*d.* He had been employed to take vegetables round on a barrow, and he received the two sums from purchasers. He did not deliver the vegetables paid for, left the barrow in a side street, and absconded with the 6*s.* 9*d.*

(*a*) See *Chapman*, p. 54, below.

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Appellant, in person, pleaded for mercy on the ground that for nearly twelve months he had been working honestly for his living.

B. Campion, for the Crown, pointed out that appellant's record before the Quarter Sessions was extremely bad—fifteen convictions on indictment, including two terms of penal servitude. No one could explain why he was not indicted as a habitual criminal. On the other hand his employer gave evidence that he had entrusted him with as much as £30 at a time, and it was all accounted for.

The Lord Chief Justice: This Court is always very careful in interfering with a sentence passed by the tribunal which has considered all the circumstances. It is also undoubtedly established that the character of this man was very bad. He has been convicted fifteen times on indictment, besides sixteen summary convictions. On the other hand, the amount stolen was very small, and there is also this fact, that he appears to have been in employment and to have had considerable amounts of money in his possession, which he dealt with honestly. Some sudden temptation may have come upon him. It is clearly a case that might have been dealt with under the Prevention of Crime Act, 1908, and we are surprised that he was not indicted for being a habitual criminal. However, we will give him a chance, and the sentence will be reduced to one of eighteen months' imprisonment with hard labour.

Sentence reduced.

JOSEPH THOMAS.

Joseph Thomas.

Severity of sentence.

This was an appeal by leave of Bray J. against a sentence of twelve months' imprisonment with hard labour passed by the Recorder of the Chester Quarter Sessions on January 16, for obtaining money by false pretences and "other frauds" under s. 13 of the Debtors Act, 1869. Appellant pleaded guilty.

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Greenfield for the appellant (under s. 10 of the Criminal Appeal Act), who was present. There were three charges against appellant : one under the Larceny Act and two under the Debtors Act. The character of the offences was mean, but the sums obtained were very small. Appellant is a man of 32 years of age, and seems to have been employed as a traveller, and down to the year 1908 there was nothing against him, so it may be assumed that till then his character was good. He was undefended and in great distress owing to the death of his mother while he was in prison, and he pleaded guilty. This is his first conviction, and the sentence is the maximum under the Debtors Act. All these frauds were committed during the months September and October.

A. J. Lawrie, for the Crown, was not called upon.

Appeal dismissed.

William Morse.

WILLIAM MORSE.

It is unnecessary violence to use a razor in self-defence against an unarmed assailant.

Severity of sentence.

This was an appeal by leave of Bray J. against a conviction for unlawful wounding, before the chairman of the Glamorganshire Quarter Sessions on January 5th, 1910, and against a sentence of six months' imprisonment with hard labour.

W. Hugh Jones for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. Appellant was to be defended by him from the dock, but the case came on while counsel was in another Court. The prosecuting counsel had pointed out the position, and a postponement was applied for, but though the Chairman had other work with which to proceed, he insisted on taking the case.

It was a "dock brief," and consequently he (counsel) was unable to let a friend hold it, although he had a friend to watch it.

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The case did not last long. The facts were these: Appellant had been suspected by prosecutor Hill of "coming after" his wife. On the day of the alleged unlawful wounding prosecutor had, according to appellant's statement, been down to his house for the purpose of giving him a thrashing, and had been following him about for some time, and had threatened to kill him, using the expressions, "I will knock you out, dead or alive," and "You will not go out of the station alive or dead." Appellant had kept prosecutor at bay for a clear half-mile with a razor, until they came to an inn called the "Travellers' Rest." He had by that time put the razor back in his pocket. The prosecutor then attacked him with his fists, and appellant struck him twice on the head with a razor. In laying down the law as to the circumstances in which appellant was justified in using a weapon the Chairman introduced a matter of sheer prejudice: "You must also consider prisoner's conduct in going about with prosecutor's wife." That means that in considering what a man should do when attacked, you should take into consideration what he has done to the person who is attacking him. With regard to sentence, the jury added a rider that he had acted under great provocation.

Griffith Jones, for the Crown, was not called on.

Darling J.: In this case the appellant had taken away prosecutor's wife, and the prosecutor was naturally indignant. Now we will assume that appellant's statement is absolutely correct. That would justify him in defending himself, but in doing nothing more than was necessary in his own defence. But he, on being assaulted by Hill, did not casually pick up a razor lying near, but took one out of his pocket. That shows intention. He gave him not one but two cuts on the head, which were very dangerous. The case was quite properly left to the jury with the direction, "Did he use more violence than was reasonably necessary to repel the attack?" The sentence is a very moderate one. We should not have interfered with a severer sentence. Appellant did not suffer through being unrepresented, but I regret that the Chairman did not assent to the application to postpone the trial.

Appeal dismissed.

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George Lewis.

GEORGE LEWIS.

Severity of sentence on "incorrigible rogue."

This was an appeal by leave of Bray J against sentence of twelve months' imprisonment with hard labour as an incorrigible rogue, passed by the Deputy-Chairman of the County of London Sessions on January 4th, 1910.

Roach for the appellant (under s. 10 of the Criminal Appeal Act), who was present. There was, it was true, a long list of previous convictions, but only two were for felony. Most were for minor offences, such as begging and being an incorrigible rogue. The appellant was 52 years of age and in bad health.

Bruce Williamson, for the Crown, was not called upon.

The Lord Chief Justice: In this case the Deputy-Chairman has inflicted the maximum penalty. It has been suggested that as this particular offence was begging, the term should have been less, but a man has to be kept from begging. We do not see that any wrong principle has been applied. There is no appeal to this Court against a conviction of this kind. The sentence will run from the date of conviction.

Appeal dismissed.

John Stephens.

JOHN STEPHENS.

There may be larceny by a trick if the owner of the goods had reason to believe that the transaction was for cash payment, though no words to that effect were used.

This was an appeal on the certificate of the Chairman of the Gloucestershire Quarter Sessions, against a conviction for larceny on January 6th, 1910, when appellant was sentenced to one month's imprisonment with hard labour.

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John Stephens.

McKenna for the appellant (under s. 10 of the Criminal Appeal Act), who was on bail. The appellant was charged together with a man named Vick with stealing twelve besoms from the shop of a man named Adams, who swore that he was a dealer for cash only. The appellant entered the shop and ordered twelve besoms, saying that he had a customer for them ; Adams tied them up, and appellant then signalled to Vick, who was outside, and handed him the besoms, saying to Vick, in the full hearing of Adams, "Take them down" somewhere. Vick then went off, taking them to the Railway Inn, where they were stored in one of the public rooms. While Vick was removing the besoms, appellant entered into negotiations with reference to another batch, but did not buy them. On Adams asking for payment, appellant said, "I haven't ordered any besoms ; you must look to the other man." By the other man he may have meant not Vick but a customer for whom he was buying. His case is that he had told Adams that he was not buying for himself. The customer is now stated to be a milkman, but his name has not been disclosed. It is submitted that there was no asportation in this case, but an out and out sale. Adams himself stated that he intended Stephens to become the owner of the goods, and that he was simply waiting for the money. It is true that he also said, "I thought that Stephens had bought the besoms as soon as he had paid for them."

[Darling J. : That moment would never arrive. Therefore he had not bought them.

The Lord Chief Justice referred to *Cohen,* 2 Den. C. C. 249; T. & M. 576 (1851).]

In that and all other similar cases where there was held to have been a larceny, there were some specific words used, such as "this is to be a cash transaction." No such words were used here. The Chairman at the trial read two passages from *Russell,* 1892, 2 Q. B. 312; 67 L. T. 124; 17 Cox C. C. 534; 56 J. P. 743; 40 W. R. 592.

Apart from the question of asportation, the question of *animus furandi* was never put to the jury. The Chairman, however, assumed it. Nor did he put to them the possibility of the "other man" being the customer, and not Vick.

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[Darling J. : You must assume *animus furandi* if goods are taken from a person against his will.

The Lord Chief Justice : Upon the evidence, what could be the good of saying to the prosecutor, "You must look to a man" whose name had never been mentioned ? All he had to do was to say "My real principal is So-and-So."

Darling J. : Suppose he had said in the shop, "No, no, you must look to the milkman."]

S. L. Porter, for the Crown, was not called upon.

Darling J. : The facts in this case are very plain. Stephens and Vick went to the shop of Adams. Stephens went in and it was arranged that he should get a trade discount. The jury found that it was a cash transaction, and it looks like one. We think that the learned Chairman gave a very proper and good direction. He read the proper case and the proper passage.

The jury were justified in coming to the conclusion taht Stephens never meant to pay, and that the shopkeeper never meant to part with his property except upon the assumption that he was going to be paid before Stephens went out of the shop.

Appeal dismissed.

William Chapman.

WILLIAM CHAPMAN (*a*).

Severity of sentence mitigated in view of good behaviour since release from prison —Whether drunkenness can be a defence in larceny, quære (*b*).

This was an appeal by leave of Bray J. against a conviction for larceny before the Deputy-Chairman of the Middlesex Quarter

(*a*) See *Benjamin Smith*, p. 48, above.

(*b*) See 1 *Russell on Crimes*, 7th ed. (1909), pp. 89—90, where the learned editors remark, "There is no reported decision in England on the question whether drunkenness can be considered as negativing the *animus furandi* in larceny," and add, "The English rule as to the effect of drunkenness on criminal responsibility seems to have been correctly laid down in a recent New Zealand case, *R.* v. *Matheison*," (1906), 25 N. Z. L. R. 879 which see.

Sessions on January 8th, 1910, and a sentence of twenty months' hard labour.

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Bickmore for the appellant (under s. 10 of the Criminal Appeal Act), who was not present.

On the evening of the 24th December the prisoner was found in possession of a pair of boots secreted up his coat. They had been exposed in a pawnbroker's shop, where the prisoner and the assistant had been in conversation. The defence was that of drunkenness, and the question was, was the prisoner capable of forming a felonious intention? He referred to *Doherty*, 16 Cox C. C. 306 (1887), and *Meade*, 1909, 1 K. B. 895; 78 L. J. K. B. 476; 73 J. P. 239; 25 T. L. R. 389; W. N. (1909) 62; 2 Cr. App. R. 54.

[The Lord Chief Justice: I do not remember any case in which we have considered drunkenness in reference to larceny. With regard to the facts the prisoner had first been inspecting some trousers, and had been sober enough to say to the assistant, "These are not Derby tweeds."]

It is submitted that the law as to drunkenness as a defence has changed. Where intent is of the essence of the crime charged, as in larceny, drunkenness is a defence, and the jury should be directed to consider whether prisoner was capable of forming the intent, or whether he, in fact, did so. Here the learned Chairman directed that there was no defence, that drunkenness was a mere aggravation, and that they had no alternative but to convict. This, it is submitted, is a misdirection.

If he had been so drunk that he had simply taken them in a drunken freak, he could not be convicted of larceny. The application, however, was originally only against sentence, and Bray J. gave leave to appeal against conviction spontaneously. With regard to sentence, there are two ways of approaching the question:

(a) The value of the property involved.

(b) The propensity to criminality of the man charged

With regard to both these methods, twenty months is a severe sentence for a man who had stolen goods worth only 6*s*. 11*d*., and who had only two previous convictions—one for stealing a hen and

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William Chapman.

the other for receiving a horse. He is now 42 years of age, and his first conviction was in June, 1905, when he was 37. His second conviction was in January, 1907, for receiving. There has been nothing against him for nearly two years—since his last release.

J. P. Oliver, for the Crown. The Deputy-Chairman took into consideration not only the two previous convictions, but the statement of the officer that he was spending his time with well-known criminals in the district. It was a logical attempt to apportion sentence, following upon a previous one of twelve months' imprisonment with hard labour. He had been recently tried on another charge and acquitted. He had also been seen trying to cut down a pair of trousers from the same shop, but the knife was not sharp enough. If there had been sufficient evidence of another offence he might have been charged with it.

The Lord Chief Justice: It is only fair to the appellant to say that he made no attempt to appeal against his conviction, but the learned judge of his own accord gave him leave. To suggest that a man is not guilty of larceny when he takes a pair of boots and puts them up his coat, having previously entered into a lucid conversation with the shopman, is absurd. In the circumstances, the legal question of whether or not drunkenness could be a defence is immaterial. I am not aware that the defence of drunkenness has ever been applied to such a case as this. There is no ground for interfering with the conviction. With regard to the sentence it is important to remember that the appellant had been nearly two years without a conviction. In the circumstances a sentence of nine months would have been sufficient in the ordinary way, but there was evidence that he had tried to cut down a pair of trousers and had failed, and that he had been frequently seen in the company of thieves. The sentence will be reduced to one of twelve months' imprisonment with hard labour.

Sentence reduced.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE RIDLEY, AND MR. JUSTICE DARLING.

THOMAS WILLIAM IRELAND CROOK.

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Thomas William Ireland Crook.

Leave given to call further evidence in view of an alleged mistake in summing up.

This was an appeal, by leave of Bray J., against a conviction for obtaining a cart by false pretences, at the Cheshire Quarter Sessions on January 5th, 1910, and a sentence of six months' imprisonment with hard labour, and also an application for leave to call further evidence.

Trevor Lloyd for the appellant (under s. 10 of the Criminal Appeal Act), who was present. Appellant, at the time of the transactions in question, was legally bailee of a cart, which he took to Tong, the prosecutor, to be mended. Appellant said that on this occasion there was some conversation between him and Tong about the former's selling another cart, and Tong himself said that it may have been that there was some conversation about getting a cart for the purpose of selling it.

[RIDLEY J.: Tong said: "I didn't tell prisoner to go and take one."]

Graham, the appellant's servant, contradicted this, and said that he remembered the latter coming back to Tong. He will now say further that Tong sent him on a message to appellant in connection with the cart in question, while it was in the latter's possession. From Tong's the appellant went, on October 5th, to the shop of a man named Maycocks, ninety yards distant from Tong's, who had one of Tong's carts, and obtained that cart, representing that he had Tong's authority to do so, and according to him,

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believing that he had such authority. To prove his *bona fides* and intention to return it, he wishes to call his servant Graham to corroborate his own statement that he told Maycock to tell Tong that the shaft was broken. He then took the cart some days later to a place named Sandbach, where he was arrested about three weeks afterwards. At Sandbach he tried to sell it to a man named Miller on October 22nd. With regard to his conduct during the time the cart was at the Crown Inn, Sandbach, the Chairman in his summing-up called attention to the fact that appellant had obliterated the name.

In point of fact, even when the police constable came on the scene the name was not obliterated, but only covered over with a piece of cloth. But there was no evidence that it was so covered at the time of the attempted sale, and it is desired to call Hancock, the landlord, to prove that it was not so covered, but was in a prominent position in the yard which was open to the public. The fact that appellant's own cart was all this time with Tong is also in his favour, as is his statement to the constable on arrest that he would not have sold the cart without first communicating with Tong.

A ground of complaint is that the Chairman, when summing up, made adverse comment on the fact that he made no answer when charged. That comment was unfair, as he had already proclaimed his innocence when arrested.

A. J. Laurie, for the Crown. Graham is the servant of the appellant, and was, moreover, called at the trial. With regard to Hancock, the covering up was not very material, and there was plenty of evidence besides.

The Court ordered that a solicitor should be instructed to take the statement of Hancock. The application for leave to call Graham was refused.

Leave to call further evidence granted (*a*).

(*a*) See p. 60, below.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE PICKFORD,
AND MR. JUSTICE COLERIDGE.

GEORGE PRICE.

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George Price.

Severity of sentence.

This was an appeal against an order of Bray J. refusing leave to appeal against a conviction for receiving stolen property, and a sentence of five years' penal servitude passed by the Recorder at the Liverpool City Quarter Sessions on January 6th, 1910.

DARLING J.: Appellant pleaded guilty at the trial. He at first pleaded not guilty, but afterwards withdrew his plea on the advice of his counsel. One ground on which he appeals against his conviction is that he did not understand what he was doing when he withdrew his plea, and that he was induced to plead guilty by the persuasions of the police. There is no ground for interfering with the conviction. He understood perfectly well what he was doing. As to the sentence, he was in the opinion of the Recorder a well-known and practised receiver, and had been the means of inducing some other persons who were tried with him to steal. The sentence is not excessive.

Application dismissed.

MAUD DENEHURST.

Maud Denehurst.

If a defendant declines to cross-examine a witness, the Court will not grant leave to appeal in order that the witness may be cross-examined.

This was an appeal from an order of Bray J. refusing bail, legal aid, and leave to appeal against a conviction of larceny at

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—
Maud
Denehurst.

the Dorset Quarter Sessions on January 5th, 1910, and a sentence of six months' imprisonment with hard labour.

The appellant was not present.

DARLING J.: The evidence shewed that she had taken lodgings from the prosecutrix for a few days, and when she left the prosecutrix found that she had lost a postal order which she had left in a workbox. When arrested the order was found wrapped up in cotton in the coat she was wearing. The only ground on which she desires leave to appeal is that she did not have an opportunity to cross-examine the prosecutrix with regard to the defence that the postal order was given to her by way of a loan. She appears to have declined to ask the prosecutrix any questions on the point, but postponed the question. When the case was completed she had her opportunity, but she did not avail herself of it.

Application dismissed.

Thomas
William
Ireland
Crook.

THOMAS WILLIAM IRELAND CROOK (*a*).

An attempt to sell a thing obtained by a false pretence raises a presumption of an intent to defraud.

Trevor Lloyd, for the appellant, stated the facts (*a*). Apart from the question whether or not appellant had authority to sell he may have believed he had such authority. The fact that there was no evidence that the cart was covered up at the time of the attempted sale renders it a matter of complaint that the Chairman should have said: "He had no reason to cover it up unless he knew that he had no authority to sell it."

Further, Miller, the man to whom he was said to have sold it surreptitiously, stated that all was clear and aboveboard, and that there was no concealment. The value of the cart was £5, and he asked Miller £4 10*s*.

Thomas Hancock, called and examined by *Lloyd*: I am the licensee of the Crown Hotel, Sandbach. Appellant came to me at

(*a*) See p. 57. above.

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the latter end of last year. I think he had some fruit in the cart which he brought. He left the cart in the yard, which is in an open place. A road runs through it to which the public have access except one day in the year. There was a name upon the cart, though I did not notice what it was. It was on both sides of the cart, and in big letters. The cart was left uncovered for the first week or so. A week or so after he brought the cart, he asked me to sell him a piece of carpet which was lying about. He did not buy the carpet, but put it on the cart the morning after this conversation. The cart was in a position where it could be seen as people passed.

Cross-examined by *Lawrie:* One side of the cart was put against the wall.

Lloyd: With regard to the sentence, he had only one previous conviction for felony, and that was two years ago, when he was convicted for stealing a horse. His other convictions were for selling unsound fish.

A. J. Lawrie, for the Crown. With regard to the comment made by the Chairman about the appellant saying nothing when he was charged, he went on immediately after that to discuss the conversation between him and the constable after arrest. Any false impression would thus be removed. With regard to the obliteration, this was not, strictly speaking, raised at all till the comparatively mild comment of the Chairman with regard to his covering up the name in the way he did. The carpet is shewn by the evidence of Hancock to have been carefully put on it. It was hanging on the cart when Mr. Miller went to see it.

[Darling J.: There must be intent to defraud. Suppose that he had got the cart without authority, we must first find the intent to defraud. His own cart was worth £2, and this £5.

Lord Coleridge J.: The prisoner never went to get his own cart back, though it was to have been returned the next afternoon.]

Darling J.: This is an important case, and one of some difficulty. The appellant was convicted of obtaining a cart by false

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Thomas William Ireland Crook.

pretences with intent to defraud. He first went to Tong's, where he left his own cart. He then went to the place of a man named Maycock, where Tong had two other carts, and there got a cart worth about £5. He travelled about the country with it and took it to Hancock's at Sandbach. While there he tried to sell it to Miller. When arrested, he said, "Tong lent me the cart," but there was no explanation of why he tried to sell it. The jury had to decide whether when he obtained it he did so with intent to defraud. It was not enough for him to intend to deprive the owner of its use, he must have intended to deprive him of it altogether, and have meant to sell it. It is perfectly plain that he might have sold it, and then gone back to Tong and got his own cart back. It was a matter which was certainly a question for the jury to decide. There is not in our opinion anything unfair or wrong in the summing-up. The jury found that he obtained Tong's cart with intent to defraud, though they might have come to a different conclusion. We cannot see that Hancock's evidence would or should have led the jury to a different conclusion.

We see no reason to interfere with the sentence. Obtaining by false pretences is a grave offence, and requires deliberation. The sentence will run from the date of the conviction.

Appeal dismissed.

William Howard.

WILLIAM HOWARD.

Severity of sentence.

This was an appeal from an order of Bray J. refusing leave to appeal against convictions for larceny and being a habitual criminal, and an appeal against the sentences of four years' penal servitude and six years' preventive detention, passed at the Leeds Quarter Sessions on the 6th January, 1909.

Appellant in person: On the 12th October I went to see my brother. I went to have a drink. I then went back to my brother's, who had not returned. I saw a little niece of mine running down the street. I was then suddenly attacked by the

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detectives, who handcuffed me, and later on tried to put two keys in my pocket. My clothes were saturated with blood. I mentioned this at the trial. The identification was unsatisfactory. First a man came in and identified three other men and then nodded his head in my direction. Then a little girl came in in a nervous way, and after looking at all the men, stood opposite me and said, "That is the man." I first heard about the watch I was charged with stealing when I got into the Court. I was in my uncle's house the day this watch was stolen. I had a black eye, and could not shew myself. The watch was pawned in the name of William Vaughan. That is not my name. An officer said that I was known by this name, but according to his own statement that was hearsay. I have been known as Patrick Vaughan, and he has confused William into Patrick. I am known in the district by the name of William Smart.

T. P. Perks, for the Crown, was not called upon.

Darling J.: In this case the appellant was convicted of stealing a silver watch which was undoubtedly stolen. The only question was whether there was a satisfactory identification of the prisoner. On that point the girl said before the magistrate, "I think that is the man," and at the trial she swore positively that he was the man. The pawnbroker swore that the pawner was very like the appellant, though he would not swear that he was the man. The watch was pawned in the name of William Vaughan. The appellant had previously been sentenced to penal servitude as Patrick Vaughan, and it was fair of the officer to say when cross-examined, "If I tell you where I first knew your name it will prejudice you with the jury."

The evidence was properly left to the jury, who could believe or disbelieve the evidence of the prosecution. The Recorder pointed out quite properly that the *alibi*, even though honest, might be inaccurate in being attributed to the wrong date.

It is open to the Home Secretary to deal with the appellant while he is undergoing preventive detention. It is good that people like him should know that there is a reason which they never had before for not being habitual criminals. It is necessary for the protection of the public.

Appeal dismissed.

FREDERICK JOINER.

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If at the end of the case for the prosecution there is no case to go to the jury, the Court, on a submission, ought to withdraw it from them (*a*).

There cannot be a conviction for larceny unless it is positively proved that the property charged in the indictment has been stolen.

This was an appeal on grounds involving questions of law against a conviction for larceny of eleven tame live pheasants at the Bucks Quarter Sessions on January 3rd, 1909, when appellant was sentenced to twelve months' imprisonment with hard labour. The property was laid in a person unknown.

Ryland Adkins for the appellant (under s. 10 of the Criminal Appeal Act), who was present. Appellant is a pheasant breeder, and at the time in question had a small farm at South Heath, Great Missenden. He lived with his wife in a little building called the Bird House. His children slept in an old omnibus. Two hundred yards away was an enclosure known as the Bird Pen, where he kept his pheasants. Two police officers swore that the prisoner went to the Bird House and then left it at a quarter past three in the morning, and that they saw him about 6.15 between the Bird Pen and the Bird House with a sack containing eleven tame pheasants with their wings (apparently recently) tied. They then arrested him.

Though, however, the police made careful and full enquiries everywhere in the neighbourhood where pheasants were kept, they did not, after a week's investigation, succeed in finding anyone who had lost any pheasants. There was consequently no evidence to go to the jury to prove larceny.

Appellant's evidence was that he had taken the birds with him from the Bird House in the night, and that he was taking them back to the pen in the morning, and that he had just changed the tapes. He denied having been out at 3.15, and there was undoubtedly a conflict of evidence.

The officers also stated that at the time appellant came to the premises he had twenty-three pheasants, and at the time of arrest he had forty-three. It is a matter of complaint that this evidence

(*a*) Cf. on this point *Pearson*, 1 Cr. Ap. R. at 79 (1908); *George*, 1 Cr. Ap. R. 168 (1908); *Leach*, 2 Cr. Ap. R. 72 (1909).

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was left to the jury, as the increase in the number of the birds, coupled with the fact that he brought some back in the dark, was all the evidence against him. At the end of the case for the Crown, a submission was duly made that there was no evidence to go to the jury.

Cracroft, for the Crown, referred to "the pepper case," *Burton,* 1 Dears. & P. C. C. 282; 23 L. J. M. C. 52; 18 Jur. 157; 2 W. R. 230; 6 Cox C. C. 293 (1852). The increase in the number of appellant's pheasants was suspicious. It was not the breeding season for pheasants, nor the time when they would be ordinarily bought. There has been no miscarriage of justice, substantial or at all. Appellant was called, and the jury must be taken not to have believed him. The evidence must be taken as a whole.

Adkins, in answer to the Court: There was no plan, but it was accepted at the trial, one of the officers agreeing, that he was going from the Bird House towards the Bird Pen. Woodside, towards which one of the officers said he was going, would be forward and rather to the right, and the pen forward and rather to the left. One of the constables said that he came from Woodside, so there was a discrepancy between the evidence of the two constables.

[Darling J.: He was seen to go from his own premises without a bag, and seen to come back with a bag. That is some evidence that they were not his own, but what is the evidence that they were stolen, even though you take the time into consideration? Of course you must add that which the jury found to be falsehoods, or rather the fact that the appellant gave evidence which was inconsistent with the evidence of the prosecution, when he said that he did not go out at three o'clock, and that he had brought these birds from the Bird House to the pen.

Lord Coleridge J.: I suppose you rely on the fact that there was no evidence to go to the jury, that the point was taken by

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the defence and the Court ruled that there was such evidence, and that the prosecution could not afterwards say, "No doubt the Court was wrong in so ruling, but afterwards there was produced evidence on which the jury could find appellant guilty" ?]

Yes.

DARLING J.: We will deal first with the legal point that there was at the end of the case for the prosecution no evidence of larceny to be left to the jury. It appears that the appellant kept a number of pheasants on his farm. On the 27th December his place was being watched. He went out at 3.15 in the middle of the night. He came back at 6.15. He went out with nothing and returned with a sack. The time is significant. There was evidence that the pheasants' wings had been tied up shortly before. Therefore the case is exactly as though this were a man who kept fowls, and who had gone out in the middle of the night with nothing, and had come back at 6.15 with eleven barn-door fowls. There was also the fact that nobody had lost any pheasants. The question is whether on these bare facts there was a case or not to go to the jury. We must look at all the circumstances—who the man was, what the time was, and so forth. But excepting the fact that it was at night, what is there on this evidence to shew that the defendant had stolen these things? We are of opinion that it was the duty of the Chairman to withdraw the case from the jury, and we have no right to say otherwise, even if anything adverse to the appellant was elicited afterwards (*a*). Therefore we take no notice as to what happened afterwards.

We distinguish this case from "the pepper case." There it was admitted that the prisoner was carrying stolen pepper. The only thing in that case was that it was difficult, perhaps impossible, to prove that the actual pepper found was the pepper from the warehouse. But that was simply because the bulk was so large that the actual grains could not be identified. Or, we may put it as Mr Justice Maule put it in his illustration from the wine at the London Docks. In this case all the facts are consistent with the appellant carrying pheasants of his own from one place to another. Nothing is inconsistent, though the time of day may

(*a*) See note on p. 64, above.

be suspicious. But we do not think that there was enough evidence to call upon him to enter on his defence.

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Conviction quashed.

Solicitors for the Appellant: *Wood & Co.*, High Wycombe.

ISAIAH BAGGOTT.

Isaiah Baggott.

Habitual criminal—The words "is leading persistently a dishonest or criminal life" in sect. 10 (2) (*a*) *of* 8 *Edw.* 7, *c.* 59, *The Prevention of Crime Act*, 1908, *refer to the time when the primary offence was committed.*

On the trial of the issue under this section (10), *regard must be had to the nature of the previous offences, with a view of determining whether he is a "professional" criminal.*

This was an application for leave to call further evidence and an appeal by leave of Bray J. against a conviction as a habitual criminal at the Dudley Quarter Sessions on January 3rd, 1910. Appellant was convicted of shopbreaking and sentenced to three years' penal servitude and five years' preventive detention.

J. Lort-Williams for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The three necessary convictions were these: 7th February, 1903, for larceny of some flour, and a sentence of six months' imprisonment with hard labour; 4th December, 1905, for stealing fowls, and a sentence of three months' imprisonment with hard labour; and on June 18th, 1906, for stealing brass, and a sentence of three years' penal servitude. The grounds of appeal are, first, that there was no evidence that the appellant was leading a persistently dishonest or criminal life, secondly, three convictions are not generally *per se* sufficient, and thirdly, this is not a case to which the Prevention of Crime Act is meant to apply. In applying it, it is submitted, regard must be had to the nature of the previous offences, whether the three statutory or others, to the length of the intervals between each and to defendant's mode of life in them. Appellant is not a professional criminal. One must look to the whole of the

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evidence. During his last sentence he was removed to the Parkhurst Lunatic Asylum in 1907, thence on the expiration of his sentence in June, 1909, to the Powick County Asylum, where he remained till October, 1909. The only evidence of a persistently dishonest life was the evidence of Superintendent Johnson, who said that he had known appellant for four years, that he was a daring, cunning thief, and that his associates were as bad as it was possible to be. In point of fact, he had only known him between the two convictions of 1905 and 1906. P. C. Taylor, again, said that he had known the prisoner for sixteen years, and that during that time he had never known him to do any work. The officer was contradicted on that point by the other police evidence. He also said, " The prisoner came out of Powick Asylum on the 4th October, and I have seen him about the streets. He has been living on what he could get from his parents, and what other people have been good enough to give him."

Superintendent Speke, moreover, said that the prisoner had done work between 1903 and 1905, and Superintendent Johnson between 1905 and 1906. He had worked in the asylum, and had also done some hawking since coming out of the asylum. When he came out of the asylum appellant went to live with his sister-in-law, a Mrs. Woodall, and other members of his family were able to do something to help to keep him.

It was also mentioned after conviction that he had applied to a Mr. Higgs, a builder, for work. A letter from Higgs is in Court to the effect that he always found appellant a hardworking and punctual young man.

As to the application to call fresh witnesses—though the witnesses were present on the first day of the sessions, they were not available when the appellant was tried. The witnesses are Mrs. Woodall, John Woodall, Higgs, and Ruth Baggott, his wife. He lived with the Woodalls for four weeks immediately after coming out of the asylum. He applied to Higgs three times for work. His wife will speak as to her earning money and supplying him with it. It is true that apart from Higgs the workhouse offered him work, but it was too laborious, and in the circumstances he would not accept it.

With regard, again, to the conviction, this case is to be distinguished from *Waller*, 2 Cr. App. R. 313; 26 T. L. R. 142, the sole precedent for a man with only three convictions being found

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a habitual criminal. That was a peculiar case because the new offence was committed within a few weeks of discharge from prison, and was the same as the earlier offence, which was the very serious one of coining.

[Darling J.: You have to prove two things: (1) three previous convictions, and (2) leading a persistently dishonest or criminal life. The three convictions may be sufficient proof of the second. Such evidence is especially cogent where the crimes are, so to say, professional, as in coining cases.]

There was no evidence that he was leading a persistently dishonest life. The crucial period was that between 4th October and 5th December, 1909. and P. C. Taylor admitted that he did not know that he had been doing anything dishonest within that period. If you count the time after the expiration of his sentence when he was in the asylum the period of honesty becomes proportionately longer.

Again, at the trial, counsel for the prosecution suggested that because the appellant had not been working, the jury were entitled to assume that he had been living dishonestly. The Recorder adopted that view, and it is a matter of complaint because the police themselves had explained how he had been enabled to live without working.

Whitehouse, for the Crown: Appellant had a fair trial; all the ingredients of the offence were considered by the jury. The commission of the new crime was evidence that he was persistently dishonest.

[Darling J.: The Act says "is," *i.e.*, at the time of *this* conviction. The verdict, moreover, might have been different if the evidence about his applying to Higgs for work had been given before and not after the conclusion of the trial.]

Pickford J.: With regard to the conviction as a habitual criminal, the last offence was in 1906, when the appellant was sentenced to three years' penal servitude. There were other convictions before that, sufficient to satisfy the statute as far as the number of convictions goes. But there is also the question of

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whether he *is* persistently leading a dishonest life, and that word "*is*" refers to the time of the conviction for shopbreaking.

Now at the expiration of his sentence he remained till the 4th October, 1909, in Powick Asylum. He then came out. In our opinion, however, some additional evidence beyond the three convictions is necessary to prove that at the time of the last conviction he was persistently leading a criminal or dishonest life. Is there any such evidence? He refused the work of stone-breaking that had been offered him by the guardians. It is said that you can infer criminality from this. But the evidence was that the appellant was living on the charity of his relations. Therefore the choice was not stone-breaking or stealing, but stone-breaking or charity. He chose the latter. It was also said by him at the trial, though without corroboration at the time, that in addition he had attempted to get work, and had got a promise of work from Mr. Higgs.

The Recorder said he relied strongly on this lack of corroboration, and pointed out that though the prisoner had said he had witnesses to call, none of them were there. Yet as soon as he was convicted P. C. Taylor supported all that the appellant had said. This, moreover, is further supported by a communication to this Court from Mr. Higgs. In these circumstances, in our opinion, this conviction for being a habitual criminal since the time he came out of the asylum cannot stand. The crime, moreover, of shopbreaking does not, like the professional crime of coining, indicate a persistently dishonest life, and it may be that being disappointed of work, he was tempted to take this piece of mutton.

Conviction as habitual criminal quashed.

John Sweeney.

JOHN SWEENEY.

Severity of sentence—Whether the Court has power to pass a sentence of penal servitude on the primary conviction, so as to qualify itself to inflict preventive detention, quære.

This was an appeal by leave of Bray J. against a conviction as a habitual criminal at the Southampton Quarter Sessions on

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January 6th, 1910, when the appellant was sentenced to three years' penal servitude for shopbreaking and stealing about eleven shillings' worth of goods, and five years' preventive detention as a habitual criminal.

Mahaffy for the appellant (under s. 10 of the Criminal Appeal Act), who was present. There are two points, first a point like that raised in *Baggott* (*a*), and second, that the Recorder sentenced appellant to penal servitude for what was a trumpery shopbreaking offence, really with the object of enabling himself to deal with him as a habitual criminal. The Court would not, it is suggested, in the exercise of its normal discretion, have given him three years' penal servitude for this offence. By sect. 10 (1) of the Prevention of Crime Act, 1908, preventive detention can only be inflicted cumulatively with penal servitude. Appellant had been convicted of larceny in January, 1909, and sentenced to twelve months' imprisonment with hard labour, being released on the 17th November, 1909. On the 8th December he was sentenced to fourteen days' imprisonment with hard labour for begging, and on the 23rd December he committed an assault, and stolen property was found on him. It is submitted that between November 17th and December 8th there was a break in his criminal life. During that time he earned his living by singing in the streets and other work. He got one day's work at the docks. Three crimes such as these ought not to make a man a habitual criminal.

S. H. Emanuel, for the Crown, was not called upon.

Lord Coleridge J.: The appellant had been convicted three times before the commission of the crime for which he was charged, and which led to the accusation of being a habitual criminal. It is only necessary to prove three crimes. The Act does not add the word "serious," and how serious the statutory crimes need to be is purely a matter of discretion. In this case the appellant had been convicted in January, 1909, and sentenced to twelve months' imprisonment with hard labour, and was released from prison on the 17th November. Then a few days after he served fourteen days' imprisonment for begging, and on the 23rd Decem-

(*a*) See p. 67, above.

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ber he was arrested for assault, and it was shewn that since his release from gaol he had broken into a shop and stolen a parcel of tobacco and some tea. The Court is clearly of opinion that not only the first but the second requisite has been made out, and the appellant was persistently leading a dishonest and criminal life.

The question has been raised whether the Recorder had power to increase the sentence he would otherwise have passed so as to qualify himself to sentence the prisoner as a habitual criminal I hesitate myself to say whether that is so or not, but in this case the point need not be decided, as we think that three years' penal servitude was a very reasonable punishment to inflict in view of the previous sentences.

Appeal dismissed.

Patrick McCreese

PATRICK McCREESE.

Severity of sentence—The value of property stolen is not the only measure of punishment.

This was an appeal by leave of Bray J. against a sentence of two years' imprisonment with hard labour after a conviction for larceny, at the Lancashire (West Derby) Quarter Sessions, on January 18th, 1910. Appellant pleaded guilty.

Appellant, who was not present, had stated in writing as the ground of his appeal that he was "in drink" at the time of the offence, and did not know whether he committed it or not.

Lindon Riley for the Crown: No doubt it was a maximum sentence, but there is a series of convictions on indictments against appellant ranging from 1883 to 1908, apart from twenty-nine summary convictions. He has twice been sent to penal servitude.

The defence of drunkenness has only been suggested at the last minute. After appellant alleged before the magistrate that (1) he found the stolen property; (2) it had been given to him; and (3) it was a trumped-up charge. The circumstances of the theft, which was of trifling articles exposed at shop doors, were

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not such as to require any degree of premeditation or ingenuity, but it was precisely the same kind of theft that appellant had been committing for twenty-five years.

Darling J.: In this case the appellant pleaded guilty to larceny of some small things. He bases his appeal on the ground that he did this under the influence of drink, and really did not know whether or not he did it. But he only arrived at that doubt after the sentence of two years' imprisonment. It is the maximum sentence apart from penal servitude. He might as well have been sent to penal servitude again, but hard labour is not as severe as it used to be when such a sentence as two years was hardly ever given. Whether or not we would have imposed the sentence ourselves we do not, in view of his numerous convictions, and the character of them, see our way to interfere with it.

Appeal dismissed.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE PICKFORD, AND MR. JUSTICE COLERIDGE.

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Albert William Ireland.

ALBERT WILLIAM IRELAND.

There is an appeal against the "special verdict" allowed by sect. 2 (1) *of* 46 & 47 *Vict. c.* 38, *the Trial of Lunatics Act*, 1883.

E. Percival Clarke for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The appellant was tried at the Central Criminal Court before Ridley J. on January 12th, 1910, for wounding with intent (1) to murder, (2) to inflict grievous bodily harm, and was found guilty on the second count, but insane at the time. He was therefore ordered to be detained as a criminal lunatic. Leave to appeal against the conviction was granted by Phillimore J. in order that the question might be argued whether this was a "conviction"; if it was not there is no appeal. Before 1883 a prisoner found insane was acquitted. Afterwards s. 2 of 46 & 47 Vict. c. 38 provides (s. 2) that the jury shall return a special verdict—"guilty . . . . but insane"—and the Court shall thereupon order the accused to be confined as a criminal lunatic till His Majesty's pleasure shall be known, who may order from time to time where and how the person shall be kept. Therefore, if these circumstances are proved, the man is to be found "guilty"—a word implying "conviction." Counsel read s. 3 of the Criminal Appeal Act, 1907.

[LORD COLERIDGE J.: Does not the adjective "guilty" involve guilt?]

Yes. If the jury are satisfied he did the act, they are to find him guilty.

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[DARLING J.: If the person doing a thing was unconscious he was doing it, there is no element of guilt.]

The jury drew a distinction between intent to murder and to do grievous bodily harm.

[LORD COLERIDGE J.: What was he guilty of?]

Wounding with intent—a criminal offence

[DARLING J. referred to *Macnaughten's* case, 4 St. Tr. N. S. 847; 1 Townsend, Mod. St. Tr. 314; 10 Cl. & Fin. 200; 8 Eng. Rep. 718; 1 C. & K. 130; 8 Scott N. R. 595 (1843). He might intend the act, not the consequences, as if he poured strychnine down a man's throat, thinking it harmless.]

The jury convicted; the only question is whether this conviction gives a right to appeal.

[LORD COLERIDGE J.: What is a criminal lunatic? Is it not a lunatic who has committed a crime?

DARLING J.: The sovereign might keep him in gaol. The Trial of Lunatics Act, 1883, 46 & 47 Vict. c. 38, s. 2 (2), says: "it shall be lawful for Her Majesty thereupon and from time to time to give such order for the safe custody of the said person during pleasure in such place and in such manner as to Her Majesty may seem fit." "From time to time" means he might be sent to a convict establishment, then to Broadmoor, then back again, and so on.]

If this is not a conviction, then whatever irregularity may occur in the trial of a lunatic, he has no right of appeal; he might be kept in penal servitude for life. Sect. 5, sub-s. 3 of the Criminal Appeal Act, 1907, 7 Edw. 7, c. 23, gives this Court power to correct the "conclusion" of the Court before which appellant has been convicted on "a special verdict." "That verdict" is "a special verdict" such as this one under the Trial of Lunatics Act, 1883; the section, therefore, contemplates an appeal where there has been such a special verdict. See also sub-s. 4 of s. 5

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and Rule 4, sub-s. d, made under the Criminal Appeal Act. This contemplates an application by a man who has to get another to act for him. The rules are made under s. 18 of the Act.

Bodkin, for the Crown : The Act of 1884 (Criminal Lunatics Act, 47 & 48 Vict. c. 64) provides what is to be done with a criminal lunatic. The justices may determine his settlement if he be remitted to an ordinary pauper lunatic asylum. "Criminal lunatic" is defined in the Act; it is only a convenient statutory expression.

[Darling J. : The jury think the person may be insane, yet that he committed a criminal act ; therefore they ought not to say "not guilty."]

I should say that he is to be taken as having committed a crime.

[Pickford J. : What object is there in altering the verdict, as is done by the Act of 1883, except to say he is guilty ?]

It is more rational. Since 1883 he is found "guilty of the act or omission charged against him, but insane . . . . at the time when he did the act or made the omission."

"Conviction" is an ambiguous word ; it has two meanings. It may mean the legal ascertainment of guilt, or that ascertainment together with judgment consequent thereon (*a*).

[Pickford J. : If the word "conviction" is equivocal, ought we not to give it the widest meaning in order to give an appeal ?]

In *Burgess* v. *Boetefeur*, 7 Man. & Gr. 481; 8 Scott N. R. 194; 13 L. J. M. C. 122; 8 Jur. 621 (1844); C. P., the question arose upon the prosecution for keeping a disorderly house, and it was held there was no conviction until the judgment of the Court

(*a*) Cf. Hale, 1 P. C. 686, on 5 Eliz. c. 14 (forgery) : "by conviction, I conceive is intended not barely a conviction by verdict, where no judgment is given, but it must be a conviction by judgment."

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upon the indictment was pronounced. On p. 504 it is pointed out by Tindal C. J. that the word "conviction" is *verbum æquivocum*.

[Pickford J.: Could this man plead *autrefois convict* or *autrefois acquit* if he was brought up again? If he could only plead "Not guilty," the jury, on the second trial, might find him guilty.]

This verdict is merely an ascertainment of guilt; there is no judgment or sentence. The order of the Court is an automatic order on that ascertainment of guilt.

[Lord Coleridge J.: Why is it not a sentence?]

It is not a punishment, nor a judgment passed as for a crime. In *Blaby's* case, 1894, 2 Q. B. 170; 63 L. J. M. C. 133; 70 L. T. 879; 18 Cox. C. C. 5; 58 J. P. 576; 42 W. R. 571; C. C. R., it was contended there was no "felonious" uttering, because there had been no previous legal conviction; but it was held that the word "conviction," as used in the Coinage Offences Act, 1861, was satisfied by the verdict of the jury, though not followed by judgment. But in this case the inference if no judgment is passed is that there has been no legal conviction.

[Lord Coleridge J.: He may wound with intent, and yet not know it is a wrongful act.

Darling J.: It does not apply unless there has been a conviction, which is the question here.]

Compare the language of s. 4 (2) and s. 5 (4) of the Criminal Appeal Act.

[Darling J.: If the order is not a punishment, why is he kept in confinement as a criminal lunatic?]

That is only a conventional method of describing it. He may be detained in various places by order of the Secretary of State. Rule 4 (d) contemplates the case of insanity, and recognises

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an agent. If the proceeding is to be taken to be against a sentence there is no appeal, because the sentence is fixed by law ; if against the order of the Court there is no appeal because the order is automatic.

[Pickford J. referred to sub-s. (4) of s. 5 of the Criminal Appeal Act as compared with sub-s. (3) of s. 4. By the latter sub-s. "the Court shall . . . . if they think that a different sentence should have been passed, quash the sentence," and leave the conviction (*i.e.*, the verdict of guilty), and alter the sentence; therefore the ascertainment of guilt is a conviction.]

Only such an ascertainment as is necessary to follow the provisions of the Act of 1883. *Jefferson's* case, 72 J. P. 467 ; 24 T. L. R. 877 ; 1 Cr. App. Rep. 95 (1908), is the only instance of the procedure in sub-s. (4) of s. 5 of the Criminal Appeal Act being followed.

Darling J. : This point arises in respect of the appellant who was tried for the offence of wounding with intent to murder or to do grievous bodily harm, and was found guilty of wounding with intent to do grievous bodily harm, but at the same time was found, in accordance with s. 2 (1) of the Trial of Lunatics Act, 1883, to have been insane at the time when he committed the offence. The question is whether the appellant has been "convicted on indictment" within s. 3 of the Criminal Appeal Act, which gives an appeal in these words : "A person convicted on indictment may appeal under this Act to the Court of Criminal Appeal

(a) against his conviction on any ground of appeal which involves a question of law alone ; and

(b) with the leave of the Court of Criminal Appeal or upon the certificate of the judge who tried him, that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the Court to be a sufficient ground of appeal ; and

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(c) with the leave of the Court of Criminal Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law."

He therefore has no appeal unless he has been convicted, and what he appeals against is his conviction. Anyone would, I think, allow that it would be a curious exception in the case of a person of this kind, not at all in his favour, that, whereas a special verdict has been given against him, he is to be excluded from the privilege conferred on other prisoners of appealing. One would expect, if the legislature had meant to make such an exception they would have said so in plain terms, and not have left it to be implied from a word of equivocal meaning. The statute, s. 2 (1) of the Trial of Lunatics Act, 1883, says: "Where in any indictment or information any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, so as not to be responsible, according to law, for his actions at the time when the act was done or omission made, then, if it appears to the jury before whom such person is tried that he did the act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict to the effect that the accused was guilty of the act or omission charged against him, but was insane as aforesaid at the time when he did the act or made the omission." It is worth noticing that this statute provides that the jury *shall* return the special verdict, and not simply a verdict of guilty or not guilty. Now if we look back to the origin of trial by jury, a special verdict was the ordinary verdict; it always was the right of a jury to return a special verdict if no statute forbade them to. This Act says they *shall* do so. Thus it is laid down in Hawkins's Pleas of the Crown, Bk. 2, c. 47, s. 3, "Thirdly, it is settled that the jury may give a special verdict in any criminal case, whether capital or not capital, as well as in a civil"; and the author quotes many authorities, including Kelynge. This also has been commented on in Hale's History of the Pleas of the Crown, vol. 2, p. 301: "The jury may find a special verdict or may find the defendant guilty of part and not guilty of the rest, or may find the defendant guilty of the fact, but vary in the manner"; very like what is prescribed by the statute in the present case. In Foster's Crown Law, p. 279, we read (s. 1): "Though the jury may, and have been

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formerly directed in the cases of infancy and insanity to find the special matter, whereupon the Court is to give judgment of acquittal, yet, *under the direction of the Court*, they may find a general verdict of acquittal without this circuity." It is plain, therefore, that long ago when it was made out that a person did a certain thing, but was insane at the time, the jury might either find a special verdict or a verdict of not guilty. Now the jury is bound to give a special verdict. But the special verdict now has totally different consequences. The Trial of Lunatics Act, s. 2, sub-s. 2, provides that "where such special verdict is found the Court shall order the accused to be kept in custody as a criminal lunatic in such place and in such manner as the Court shall direct till His Majesty's pleasure shall be known; and it shall be lawful for His Majesty thereupon, and from time to time to give such order for the safe custody of the person during pleasure, in such place and in such manner as to His Majesty may seem fit." The question is, does this process result in a conviction? If not, what does it result in? If in the special verdict, is that a verdict of guilty or verdict of not guilty? Certainly not a verdict of not guilty. By the words of the statute (above) the special verdict is to the effect that the accused "was guilty of the act or omission charged against him." That is substituted for the old form in which the special verdict was given or verdict of not guilty. Now it is a verdict of guilty, but the person so found is to be treated as a criminal lunatic. Suppose a person against whom a verdict of this kind is given is indicted again on the same charge. What will he plead? Any other person so charged would plead *autrefois convict* or *autrefois acquit*. Could this man plead *autrefois convict?* If not, he might, perhaps, be tried again, and a different verdict might be given. It is impossible the law intended to lay him open to such a grave disadvantage, for no provision is made for pleading the special verdict. These are the words in the Criminal Appeal Act: "A person convicted may appeal." In *Burgess* v. *Boetefeur*, 7 M. & G. at p. 498, it is said: "If the jury find him guilty, he is then said to be *convicted* of the crime whereof he stands indicted," quoting from 4 Blackst. Comm. p. 355. Tindal C. J., in giving judgment, says (p. 504): "The word 'conviction' is undoubtedly *verbum æquivocum*. It is sometimes used as meaning the *verdict* of a jury, and at other times in its more strictly legal sense, for the

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sentence of the Court." It is perfectly obvious that these words "convicted," "conviction," are neither of them words of precise meaning. The question is, may they mean such a thing as the special verdict of the jury prescribed under the Trial of Lunatics Act and the subsequent proceedings or orders following? We are of the opinion, strengthened by every one of the sections of the Criminal Appeal Act and by the rules made thereunder, that the special verdict and the order made thereon amount to a conviction, and that the person as to whom they are given and made is a convicted criminal, and has a right of appeal to this Court. The appeal will be heard on its merits later (*a*).

GEORGE COLLINS.

George Collins.

Severity of sentence—When the judge at the trial has explained to the defendant what the charge of being a habitual criminal implies, the Court will not review the sentence passed on a plea of guilty.

The prisoner pleaded guilty at the Central Criminal Court before the Common Serjeant on January 13th, 1910, to a charge of burglary, and of being a habitual criminal, and was sentenced to three years' penal servitude, to be followed by five years' preventive detention. He now appealed against the latter sentence.

Appellant, in person, stated that when he pleaded guilty both to the burglary and to being a habitual criminal, he did not know what it meant.

Ambrose, for the Crown: The Common Serjeant read the words of the Act to the prisoner.

[DARLING J.: When you said, "Well, at that rate, I must have been," what did you mean?]

Appellant: I meant from the number of convictions against me.

(*a*) See p. 87, below.

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Ambrose: I cannot say that appellant understood what was meant by pleading guilty to being a habitual criminal. I called no evidence to prove that he was, on account of his plea of guilty: nor can I prove that he understood. There was some evidence, however, from the cross-examination that he was a habitual criminal. He was released from his last term on November 22, 1909. He was sentenced to one month's imprisonment on summary conviction in April, 1902. He was no sooner out than in again. A police sergeant said he had known him several years, and had never known him do any work.

Darling J.: In this case the appellant seeks to set aside a part of his sentence. He was convicted on his own confession of a burglary of a grave character, involving fifty pounds' worth of goods, and it was shewn that this was his fourth conviction for burglary or attempted burglary. The first conviction was in 1902; since then he has been convicted in 1903, twice; in 1904 for burglary with three years' penal servitude; in 1907 for burglary with twenty-one months' imprisonment with hard labour; and within two weeks of his release he committed this crime. He pleaded guilty to both charges, viz., of committing burglary and of being a habitual criminal, after the Common Serjeant had carefully explained to him what "a habitual criminal" meant, and what the punishment was. It may be a little doubtful whether he understood that the convictions alone might prove he was a habitual criminal; but he is a very intelligent man, though, like many other prisoners, he is dissatisfied with his sentence. The Common Serjeant sentenced him to three years' penal servitude and five years' preventive detention, having explained to him the procedure; he gave him a chance of considering his position. If we acceded to his wish, and reduced or cancelled the period of preventive detention, we must increase the sentence of penal servitude. This is his third conviction for burglary. No judge would dream of imposing only three years in such circumstances. The Common Serjeant said he wished to make the penal servitude as short as he could in order that the sentence of preventive detention might come into force at once. In these circumstances there is no ground for us to interfere.

Appeal dismissed.

JACOB OR JOHN GOLDING.

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Where there is a direct conflict of testimony, if the main issue is put fairly to the jury, the Court will not interfere merely on account of some want of clearness in the summing-up.

Appeal against conviction on certificate of the trial judge.

Paley Scott, for the appellant, who was on bail. He was convicted at the North Riding Quarter Sessions on January 6th, 1910, of obtaining a cheque for £17 10*s*. from one John Muir by false pretences and was sentenced to six months' imprisonment with hard labour. The case of the prosecution was that appellant and prosecutor and the latter's son travelled from Middlesbrough to Newcastle last May to see about buying a bicycle business from one Whitfield. On the way appellant shewed to John Muir a county court summons against Whitfield with a promissory note for £35 on which the summons had been taken out. Appellant persuaded John Muir to pay half the amount of the note, saying he would himself pay the other half and free Whitfield from the debt and save the business, which John Muir was going to buy from the brokers. This amount, £17 10*s*., was, according to the prosecution, paid the next day by the cheque which was the subject of the charge. The pretence was that the county court summons had been taken out on a *bonâ fide* promissory note given by Whitfield to one Edward Morris.

[DARLING J.: The indictment alleged that appellant falsely represented that Whitfield was then indebted to Morris in £35, &c.]

The defence was that appellant had himself taken out a county court summons against Whitfield for £35, which he had lent to Whitfield, using the name of Morris in order to put pressure on Whitfield without destroying the friendship between them. He denied that he ever shewed this summons to Muir, but the main portion of the defence was that whatever might be the truth as to that transaction, the cheque for £17 10*s*. was given by Muir to appellant to enable him to buy Whitfield's stock. The witnesses in support of that defence were not cross-examined. The

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only indication why, was that counsel who appeared for the prosecution, in his final speech to the jury, said that the transaction they referred to was a different matter. This suggestion came as a complete surprise to the defence, and could have been disproved from Muir's bank book which was in Court at the trial.

R. Luck, for the respondent: I was for the prosecution. The prisoner went into the box, and I cross-examined him. The witnesses subsequently called gave evidence which had been dealt with by the witnesses for the prosecution in their cross-examination, who denied the defence put to them. Therefore I did not cross-examine appellant's witnesses. The second part of the defence was that the cheque for £17 10*s*. was actually received in respect of Whitfield's goods after they had been taken by the landlord, but the amount was different, and the transaction was separate, and subsequent to the obtaining the cheque for £17 10*s*. by false pretences.

Paley Scott: The cheque was sworn by John Muir to have been drawn the day after the Wednesday of the trip to Newcastle (which was the 5th). It was dated the 8th, and passed through the bank on the 10th (Monday). But the banking account was only opened on the 7th, and Muir's son, whose account it was, swore that the cheque was drawn after the account was opened, which would be the 8th, at the earliest, the day on which the witnesses for the defence say that it was drawn. If it was drawn on the 8th, the prosecution's case is impossible, for that depends on the cheque having been drawn on the 6th, and post-dated the 8th.

[Darling J.: Did he shew them the county court summons? If so, why?]

Appellant denies that he did, but whether he did so or not, their story about the cheque was impossible.

[Darling J. (after reading the receipt for £35 alleged to have been paid by appellant to Morris): But appellant only says Muir gave the money to himself. He does not explain the receipt pro-

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duced, and said to have been given by the imaginary Morris to him for the £35, the subject of the summons.]

Appellant was not bound to give an explanation of that. It was admitted the stock was paid for at the sale by appellant, and that it was subsequently taken to John Muir's house, and appellant never had any part of it,. The cost with fees was substantially £17 10*s*

[Darling J.: You must accuse Muir and his son of downright perjury.]

Clearly somebody perjured himself. The Deputy-Chairman never mentioned this cheque story to the jury Taylor, who was called for the defence, was not mentioned in the summing-up, though his evidence was unchallenged by the prosecution. It was that he saw the cheque signed on the 8th, at a shop where young Muir was employed, and handed to appellant on his suggestion of buying Whitfield's stock at a compulsory sale. The jury were never told in the summing-up what the false pretence was, or that they had to find that the money had been obtained by it. They were made to think both counsel and judge thought nothing of the defence.

Luck was not called upon.

Pickford J.: This defendant was charged with obtaining £17 10*s*. by false pretences from John Muir. Muir's story was that he and defendant were contemplating buying Whitfield's stock, and did buy it, for £15 and expenses; that he gave a cheque for £8, and afterwards paid the balance to the defendant. That was one transaction. When going to Newcastle to see Whitfield, defendant represented that Whitfield owed a person named Morris £35. and that Morris had taken out a county court summons for that amount. Defendant, according to Muir, said that unless something was done Whitfield would be sold up, and their little transaction would come to an end. He asked Muir to pay half. Muir agreed. Later defendant produced a receipt (whether on the 5th or the 8th) for £35 from Edward Morris & Co., and told Muir he had paid the £35, and asked for half. Muir and his son say that the son drew the cheque on the 6th, and

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gave it to the defendant. As to the dates, they say that they went to Newcastle on the 5th, the cheque was drawn on the 6th; according to the defendant, the account was not opened till the 7th, and the cheque was dated the 8th. But the important point in the case is that defendant produced the promissory note given to Morris and the county court summons in the name of Morris, and then afterwards said he had paid off the debt and produced the receipt. The answer is that it is all untrue; that defendant never got the receipt alleged to be produced to Muir, and that the £17 10*s*. was paid for Whitfield's stock. Also there is a denial of Muir's story. The defendant produced witnesses who said they were present when Muir and defendant discussed the stock, and saw the cheque drawn for it. They were not cross-examined, because Mr. Luck thought it was clear to the jury and the Chairman that this referred to another cheque if it was true; but probably it was not true. Perhaps it would have been better if the witnesses had been cross-examined. The Deputy-Chairman left the case to the jury: but not the case about May 8th, when £17 10*s*. was given, nor the fact that defendant's case set up that the £17 10*s*. was given for the stock; but simply said the question was, whom did they believe? Perhaps it would have been better if the issues had been put more clearly. But we are not prepared to say there was misdirection, or that there was sufficient fault in the summing-up to justify a decision that the conviction should be quashed. In any case it is clearly within the proviso of sub-s. 1 of s. 4 of the Criminal Appeal Act as to "substantial miscarriage of justice," which we do not think has taken place. There was ample evidence of a story being concocted of money owing to Morris, and that by those representations the defendant had obtained the £17 10*s*. from Muir. The jury were asked to say whether they believed the story of the prosecution or that for the defendant, and they said that of the prosecution.

Although the prisoner has been on bail we think the sentence should run from the date of the conviction.

Appeal dismissed.

Solicitor for Appellant: *Reuben Cohen*, Stockton-on-Tees.

Solicitors for Respondent: *Thomas and Malkin*, Stockton-on-Tees

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE JELF, AND MR. JUSTICE PICKFORD.

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ALBERT WILLIAM IRELAND (*a*).

Appeal against a verdict of insanity.

E. Percival Clarke, for the appellant (under s. 10 of the Criminal Appeal Act), who was present. Appeal is not made on the ground that appellant did not do the act, but that he was not insane at the time of committing it, and that he should be sentenced to an appropriate term of imprisonment, and not be liable to detention for life. When he thought he had killed the woman into whose neck he plunged a butcher's knife, he thought he was going to be hanged, and feigned insanity. The shorthand note of the trial has been lost—only the judge's notes are available. Prisoner at the trial did not set up the defence of insanity, and it was no part of the duty of the prosecution to give evidence on that issue.

[JELF J.: There is a legal presumption in favour of sanity.]

Bodkin, for the Crown, explained that at the trial no evidence as to insanity was called on behalf of the Crown, but at the request of the judge and for the convenience of the Court he examined the prison doctor, who was present, and whose evidence prisoner desired should be given as to his mental condition.

The Court stated that another and a very full report had been received from the doctor at Broadmoor, who stated that appellant was subject to epileptic fits.

(*a*) See p. 81, above.

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Clarke: But there is no evidence that he was under the influence of epilepsy when he committed the crime.

Bodkin: Under 47 & 48 Vict. c. 64, the Criminal Lunatics Act, 1884, the Secretary of State has ample power to release a criminal lunatic, when it is safe to do so.

DARLING J.: We decided last week that a person who was found to be insane at the time of committing a crime is allowed to appeal. Appellant stabbed a woman and did her serious injury, saying that God had told him to do it. He was tried for this offence and found insane. If we find he was shamming we ought to set aside conviction and substitute penal servitude or such punishment as he deserved. We are satisfied that at this moment he is insane and is always in a state to commit homicidal acts. It is beyond dispute that he is liable to epileptic seizures and homicidal impulses that he cannot control. He has been insane since the time as to which evidence was given at the trial. There is no ground for the assertion that the appellant might be kept in an asylum for the remainder of his life, as he can always be discharged when it is safe to do so.

Appeal dismissed.

Henry Street.

HENRY STREET.

The Court tends to limit a first term of penal servitude to the minimum (three years).

This was an appeal, by leave of the full Court granted on February 5th, against sentence of five years' penal servitude after a plea of guilty to obtaining three small sums of money by false pretences, at the Lincolnshire (Lindsey) Quarter Sessions, on January 7th, 1910.

Appellant in person.

Moresby White, for the Crown. Other offences in that district

than those mentioned in the shorthand note were alleged against appellant.

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[JELF J.. Then can we consider them?]

PICKFORD J.: In this case the appellant has pleaded guilty to obtaining money under false pretences after several convictions for similar offences, and sentences varying from one month's to two years' imprisonment with hard labour. His character is bad, and the time for imposing a sentence of penal servitude is come. As, however, this is the first sentence of that nature the Court is of opinion that three years should be substituted for five.

Sentence reduced.

JOHN OWEN WILLIAMS.

John Owen Williams

Exposure of a child, within sect. 12 (1) *of* 8 *Edw.* 7, *c.* 67, *the Children Act*, 1908, *does not necessarily imply abandonment.*

This was an appeal against conviction by leave of the full Court on February 4th, reversing an order of Bray J. refusing leave to appeal, and also an application for leave to call further evidence and to appeal against sentence.

The appellant was convicted under s. 12 (1) of 8 Ed. 7, c. 67, the Children Act, 1908, at the Monmouthshire Quarter Sessions on January 5th for neglecting and exposing his three children, and sentenced to twelve months' imprisonment with hard labour.

The relevant words of the section are: "If any person over the age of sixteen years, who has the custody, charge, or care of any child or young person, wilfully assaults, ill-treats, neglects, abandons, or exposes such child or young person . . . . in a manner likely to cause such child or young person unnecessary suffering or injury to his health . . . . that person shall be guilty of a misdemeanour."

Harold Ward for the appellant (under s. 10 of the Criminal Appeal Act), who was present. I defended below, and appellant

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gave me a lengthy statement which I did not use, and he now makes that a ground of appeal.

[Darling J.: He has sent us a lengthy one; we think you were right.]

There were separate counts for neglecting and exposing, and there was no evidence of either. At the worst he took the children out on tramp. Appellant's wife left him in April last year, taking the children with her, and he subsequently discovered they were all in Westbury Workhouse. He took them out, with a view of taking them to a house thirty miles away, where he had been lodging. On the way they arrived at Chepstow on a cold, wet night, and he took them to a common lodging house, but finding that there were no beds he declined the offer of a room with a fire to sit up in all night, and moved them on.

[Darling J.: That is the worst part of the case.

Jelf J.: He made them walk in all thirty miles.]

Although expressly forbidden to ask prisoner any question by the Recorder, a juryman asked appellant if he had been previously convicted of a similar offence; he did not answer, and the Chairman did everything possible to prevent the jury from being prejudiced thereby against him, but they at once returned a verdict of guilty. Clearly through not answering he was hurt. It was true that he had been twice convicted of the same offence, viz., neglect—in 1905 at Preston (six months' imprisonment), and at Herefordshire Quarter Sessions in 1908 (recognisances), but after waiting ten weeks for trial twelve months is too long a term.

Sect 12 (1) of the Children Act, 1908, provides that "a parent or other person . . . . shall be deemed to have neglected him . . . . if he fails to provide adequate food, clothing, medical aid, or lodging for the child or young person, or if being unable otherwise to provide such food, clothing, medical aid, or lodging he fails to take steps to procure the same to be provided under the Acts relating to the relief of the poor." It is true that appellant took his children out of the workhouse, and on one or

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two nights failed to provide them with adequate lodging or to take advantage of the provisions of the Acts for the relief of the poor. But a charge of neglect cannot be based upon an isolated incident—systematic and continued neglect must be proved.

[Darling J.: We think the charge of exposure is the worst part of the case, and wish to hear you on that.

Pickford J.: When leave to appeal was given we felt some doubt, whether "exposing" does not mean something more than merely taking a child out in inclement weather.]

There can be no "exposure" of a child without abandonment. A person may be exposed to a particular thing, as "to danger" or "to attack," and the term "to expose" in its ordinary sense is always qualified by the addition of the thing to which the person is exposed. But a child is said to be "exposed" without such qualification, and in this connection the expression "to expose" has acquired a special and well-recognised meaning, and implies abandonment of the child in some open place where, but for an intervention of Providence, it will die. See the New English Dictionary, *s. v.* There has been no legal interpretation put upon the word "*expose*" in any of the Acts relating to children, or in any decided case, and in the absence of such interpretation the meaning borne by the expression in ordinary language must prevail. There are only two decided cases, and those not of great assistance. *Falkingham*, L. R. 1 C. C. R. 222; 39 L. J. M. C. 47; 21 L. T. 637; 18 W. R. 385; 11 Cox, C. C. 475 (1870); and *White*, L. R. 1 C. C. R. 311; 40 L. J. M. C. 134; 24 L. T. 637; 19 W. R. 783; 12 Cox, C. C. 83 (1871).

The terms "abandon" and "expose" are found in juxtaposition in all the enactments relating to cruelty to children, and are *ejusdem generis*. (24 & 25 Vict. c. 100 (Offences against the Person Act, 1861), s. 27; 52 & 53 Vict. c. 44 (repealed), s. 1; 57 & 58 Vict. c. 41 (repealed), s. 1; 4 Edw. VII. c. 15, s. 1 (repealed); 8 Edw. VII. c. 67, s. 12.)

[Jelf J.: "Exposure of infants" was a recognised practice in

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ancient times, and is so still in some countries. Do you say that the word "expose" in this section refers only to that practice ?]

The word derives its meaning from that practice, and implies abandonment and something more, namely, such exposure to the elements that the child's life will be in danger. There must be intentional endangering of the child's life or health or a reckless disregard of the consequences to the child. In this case the evidence shews that the appellant did all he could to provide food, clothes and shelter for his children, except that he declined to shelter them in a particular house.

[Darling J.: If you are right, a person who exposes a child could be indicted for murder or attempted murder.]

He might be indicted under the Children Act.

[Jelf J.: Can it turn on his going away and leaving the children?

Darling J.: If he stood the children out of doors in the pouring rain and said to them, "You stand here and see you don't move till I tell you," would not that be "exposing" ?]

Not within the meaning of the Act. The section enumerates five offences:—"Assault, ill-treat, neglect, abandon, or expose." Each of the last four terms denotes something more, and a more serious offence, than either of the terms preceding it. If to expose means only to take a child out in inclement weather, it means no more than "neglect," or "ill-treat," and this part of the section is tautologous.

[Pickford J.: Suppose "expose" to have the narrower meaning, can you give me an instance of "exposing" without its being included in abandoning ?]

A person who "exposes" a child would be guilty of abandoning, but the offences are not the same. *Falkingham* (above) was an instance of "abandoning" which was not "exposing," though the prisoner in that case was indicted "for that he did abandon

and expose," and the report does not make it clear of which offence he was convicted.

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Clarke Hall, for the respondents, The National Society for the Prevention of Cruelty to Children, was not called upon.

DARLING J.: Prisoner is charged under sect. 12 of the Children Act, 1908, with exposing and neglecting his children. He took his children out of Westbury Workhouse and started for a place thirty miles away. The weather was very bad. He arrived with them at Chepstow and could not obtain sleeping accommodation at a common lodging house where he called. He was offered a fire and a room to sit up in. He refused this and decided to go on although he might have procured lodging in a workhouse.

It is not necessary to decide the point as to neglect as, in this case, we think the appropriate word is "expose." Counsel has contended that to "expose" means to physically place children somewhere with intent to injure. The statute, however, tries to prevent unnecessary suffering, and the prisoner had dragged the children about the roads instead of providing them shelter. He had been convicted of similar offences on two previous occasions.

Appeal dismissed.

Solicitor for the Respondents: *W. J. Treharne.*

PETER JACKSON.

Peter Jackson.

Alibi—*Severity of sentence mitigated by good conduct for a period—Unless the Court is of opinion that the further evidence that has been called would have caused the jury to acquit, it will not quash a conviction.*

Appellant was convicted at the Leeds Quarter Sessions on January 6th, 1910, of larceny and as a habitual criminal, and was sentenced to five years' penal servitude, and six years' preventive detention. His application for leave to appeal against these convictions was referred by Bray J. to the full Court on February 4th.

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Peter Jackson.

L. P. Clay, for the applicant (under sect. 10 of the Criminal Appeal Act), who was present, stated that the case turned entirely on the question of identity. The defence was an *alibi*, and three witnesses to prove it attended the first and second days of the Sessions, but, despite the instructions of applicant's counsel, who had seen them, they were not present on the day of trial. Counsel made no application for an adjournment, though the jury expressed a wish to see those witnesses, and the Recorder put it to the jury against defendant that they were not called. Affidavits from two of those three witnesses were put in. The Court having read them, granted leave to call them, and generally to appeal.

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L. P. Clay, for the appellant (under sect. 10 of the Criminal Appeal Act), who was present. In this case prosecutor says he met appellant in the street at Leeds on December 8th at 2.30 p.m. He entered into conversation with him, and they were joined by another man. They induced prosecutor to part with a sovereign, which they said they were going to put on a horse. Shortly after they disappeared. Prosecutor went to the Town Hall and identified appellant from a photograph. He also identified him in a group of nine men the same evening. Appellant denies ever seeing the prosecutor; he was in a public-house, "The Fox," between 2 and 3.15 p.m. on December 8th, when the theft took place, playing dominoes with five other men. A gilded farthing and a Boer coin were found on appellant. Prosecutor said he did not notice appellant very closely.

Two witnesses, *Harry Conlon* and *J. H. Hawksworth*, were then called to prove that appellant was in their company in the public-house at the time and on the day in question. That house was a mile away from the scene of the theft. They had been informed that the trial at which appellant had been convicted had been postponed till the following Monday. Both witnesses, cross-examined by *W. Stewart*, for the Crown, admitted having been convicted for assault and other offences.

[Pickford J.: Must we not be satisfied that the probability is overwhelming that the jury would not have convicted if they had heard the additional evidence now called before us?

Jelf J.: Any trial might be upset if fresh evidence like this were admitted.]

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The evidence of the prosecutor as to identification was distinctly weak. On being pressed he admitted that he had not noticed the man whom he met in the street very closely. At the Town Hall he was shewn two photograph albums, and was unable to find the photograph of the man in them. Then he was shewn a single photograph, which he identified as that of the man he had met. This was not a fair identification, and the subsequent identification of appellant from the group of nine men depended on it. In face of this it is probable that if the evidence of Conlon and Hawksworth had been before the jury, appellant would have been acquitted. This was not a case of a manufactured *alibi*, as the witnesses were present on the first two days of the sessions prepared to give evidence, and it was owing to a misunderstanding that they were not present on the day of the trial. Consequently the conviction ought to be quashed.

W. Stewart, for the Crown, was not called upon.

Jelf J.: The appellant says that the case for the prosecution is weak as it depends almost entirely on the identification of one person, and complains that he could not prove his *alibi* owing to his witnesses not appearing. We think that the case is not so weak as has been suggested, as the prosecutor had ample opportunity of seeing the appellant for half an hour or three-quarters. There was some little doubt at first as to the identification by a photograph, but all was properly put to the jury at the end, and the jury were of opinion that there was plenty of evidence of identification. A gilded farthing looking like a gold coin was found on him, and it was suggested that his accomplice helped in the fraud by passing it to him, and so induced the prosecutor to part with his money.

The additional evidence called is of a doubtful character. The Act does not allow a new trial to be granted, and the conviction can only be quashed in a case like this if we think that the jury must have believed the new evidence, or, at all events, that there is a very strong probability that they would have done so. To interpret the statute otherwise would be to cause it to do injustice by allowing the guilty to escape. The appeal must therefore fail. As to sentence, the general tendency of the Court is to shorten somewhat, not unduly, the term of penal

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servitude so as to accelerate that of preventive detention: *Charles Smith,* 3 Cr. App. R. 47; W. N. (1909) 211; *Thomas Smith,* 3 Cr. App. R. 92; W. N. (1909) 235. As the last conviction of a grave character, when a sentence of penal servitude for five years was passed on the appellant was in 1893 (seventeen years ago), and he has not given much trouble for the last two years, though there are several previous convictions, the sentence of five years' penal servitude is reduced to three, but that of six years' preventive detention must stand.

Sentence reduced.

Annie Lewis.

ANNIE LEWIS.

In order to convict a receiver of stolen property, there must be clear evidence of some possession on the part of the defendant.

Appellant, convicted at Salford Borough Quarter Sessions on January 21st, 1910, of receiving stolen property, was sentenced to twelve months' imprisonment with hard labour. The property was stolen from the house of one Hartley on November 1st, 1909, and six prisoners were indicted with appellant in respect of the theft.

This was an appeal by leave of Phillimore J. against conviction and sentence.

H. Gorell Barnes, for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The grounds of appeal are:

1. The case for appellant was not put to the jury in summing-up;
2. The verdict was against the weight of evidence.

The case for the prosecution was based on the following grounds. Appellant had been in association with the occupants of 49, East Taylor Street, where part of the property in question and other stolen property and certain burglarious implements were found. One of these persons, Scandrell, pleaded guilty to the charge in the indictment; the other, Lees, was found guilty of receiving. There was evidence that appellant had before the

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1st of November, the date of the burglary, frequently visited 49, East Taylor Street, that she subsequently kept the house at 45, James Henry Street, which she took on the rent-book of Scandrell and Lees, who were passing as Mr. and Mrs. Plimmer, and that she had subsequently been to 49, East Taylor Street from time to time, and was in constant communication with the other prisoners.

At 45, James Henry Street she was living with Gardner, who pleaded guilty to the burglary in question.

Part of the proceeds of the burglary in question, together with other stolen property, the proceeds of a burglary on December 10th at Sheffield, was found in her house on the day of her arrest. Some of the property in question was tied up with some of the Sheffield property, and was found between the mattresses of the bed in the back room; but the evidence shewed that Gardner used that room; the rest of the Sheffield property there was found in a parcel behind a mangle in the scullery, and a jemmy beside it.

This Court in *Dinnick*, 26 T. L. R. 74; 3 Cr. App R. 78 (1909), has said that the judge, in summing-up, is bound to put to the jury the defence, however weak it may be.

The summing-up as to this prisoner did not put her case at all. The only reference to it was that the Recorder cautioned the jury against paying any regard to the fact which came out under the Prevention of Crimes Act, 1871, in respect of the stolen property, that she had been convicted in February, 1908, as a receiver. In summing-up, the learned Recorder said, "Don't you think she must have known?" *i.e.*, he assumed guilty knowledge. She was defended jointly with another prisoner, but did not give evidence. Her case was that she did not know that the property was in the house when she was arrested on December 10th as she stated to the policemen on her arrest, from which it follows that she could not be in possession of the property. The Recorder in his summing-up shewed that he accepted the evidence of Mrs. Green, a co-prisoner—as the jury did by their verdict when they acquitted her. Now Mrs. Green was appellant's mother, and she was residing in the house throughout this period, so that she had the same knowledge and was in exactly the same position as appellant. It is submitted that the learned Recorder certainly ought to have pointed out the extremely important bearing which

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Green's evidence had on the defence of Lewis, which it absolutely bore out.

[Jelf J.: Was there any other evidence against her than that she was in the house ?]

Association between her and others in the house where stolen property was found was suggested.

[Jelf J.: I doubt whether mere intimacy with persons convicted of crime is enough. Was no "overt act," so to say, alleged ?]

Only the finding of the two parcels at the house occupied by appellant.

[Pickford J.: The parcel in the scullery is in a very different position from that under the mattress. All the property *charged in the indictment* seems to have been under the mattress: it is important to know this.]

This certainly appears to be so. The latter was only found after Gardner had occupied the bed on the previous night; till he came Mrs. Green slept there. There is no evidence that appellant ever slept there. Both she and he were arrested on the day after he came back.

Green's evidence is to the effect that up to the day of the arrest, December 10th, she had been occupying the bed in the back room, and that no bundle such as that subsequently found was there on the morning of December 10th ; that she had occasion to use the mangle that morning, and that the parcel subsequently found there in the afternoon was not there when she used the mangle.

The rent-book is in the name of the Plimmers, but in that class it passes easily from hand to hand.

It was clear from the evidence of the police that Gardner had been absent from December 2nd until December 11th, when he returned about 3 p.m., which clearly points to appellant's being correct in saying that there was no stolen property in the house before Gardner came, and that he brought the whole of the stolen property into the house with him then: the proceeds of both

robberies, that on November 1st and that on December 10th. The jewellery the subject of this indictment, which was all taken on one of these occasions, was found in the one parcel under the bed, together with some part of the other "haul." Now of course the articles stolen on December 10th could not possibly be in the house before. The other parcel only contained proceeds of the theft on December 10th. Also, according to Gardner's statement before the magistrates, "everything found at 45, James Henry Street relating to jewellery or anything else belongs to me, and no one else knows anything about it."

The conversation overheard by the police constable between the three women in gaol, which led to a second search at 49, East Taylor Street, and the finding of more stolen property, hidden under the floor, is no evidence against Lewis ; if anything, it is in her favour, since none were so found at her house on a second search.

As to the incidental evidence of a previous conviction, this was ruled admissible against Warr, another prisoner convicted with appellant, so I did not take the point, and, therefore, I presume I cannot take it now.

[Jelf J. : You put the rule too high against yourself.

Darling J. : The fact of such admission of evidence is fundamental. Could she not be an accessory after the fact ?]

Mere knowledge and failure to inform the police cannot make her an accessory.

[Jelf J. : The premises are hers; the things are on *her* premises. Is not, therefore, the possession of the things hers?]

The mere fact of the finding of stolen property at an alleged receiver's premises does not afford any or adequate evidence of possession and there was none to be left to the jury. To conclude, the remark of the Recorder, "Don't you think she (Lewis) must have known all about it?" is a totally inadequate treatment of her defence. All these points ought to have been indicated to the jury ; had this been done, they clearly ought to have acquitted her.

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In any case, the sentence was too severe, the previous conviction was not for a serious offence, and did not point to appellant's being a professional receiver.

A. J. Laurie, for the Crown: There is admittedly no evidence that she received except that she is in possession. She was one of the owners of the house when the stolen property was discovered, and associated with the prisoner Gardner. The most suspicious circumstance is that jemmies and pawn tickets relating to other stolen property were found in the house, lying about quite openly, so that she must have known for what purpose Gardner was using the house. Hers was a joint possession, and she was working in conjunction with the others—a gang of thieves—although there is no evidence of actual physical possession by her.

Jelf J.: The appellant was indicted with several other persons for stealing and receiving property. Appellant was found guilty of receiving the property well knowing it to have been stolen. The house to which the property was traced was hers, and she cohabited there with a man named Gardner.

In a mattress in the house was found a silk handkerchief containing a portion of the stolen property. There was no evidence that she slept on the bed on which was the mattress. Another of the prisoners, Mrs. Green, her mother, slept there when Gardner was away.

In his summing-up the learned Recorder made use of the expression, "Do not you think she must have known all about it?" Even if she did know all about it, this is not possession by her if Gardner was the thief and did not part with the possession. Even assuming that appellant knows that those with whom she is consorting are thieves, the mere fact of finding property admittedly stolen on premises occupied by her is not *per se* sufficient to raise a presumption that she is in possession of that property. We do not think she has even been proved an accessory after the fact, as there was no concealment by her to prevent the goods being discovered.

Conviction quashed.

BEFORE

MR. JUSTICE BRAY, MR. JUSTICE PICKFORD AND MR. JUSTICE COLERIDGE.

OTTO KLEISS.

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An immaterial misdirection is not a ground for giving leave to appeal.
The validity of a recommendation of deportation is not necessarily affected by the length of time the alien has resided in this country.

Appeal from an order of Phillimore J. refusing leave to appeal against conviction, and application for leave to call further evidence.

Appellant was convicted on the 20th January, 1910, at the County of London Sessions before the Deputy-Chairman of receiving a bicycle, and sentenced to six months' imprisonment with hard labour, and was recommended for expulsion.

R. Simpson for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The learned Deputy-Chairman misdirected the jury generally in making no reference to or comment on the evidence in favour of appellant; and he misdirected them upon a specific point of law when he stated, "What you have to say is—did he receive this machine knowing it to have been stolen? And for the purpose of your enquiry whether he received it accidentally or whether he received it with a guilty knowledge, if you are satisfied that any one of these machines" (other machines found in his possession at the same time as the bicycle the subject of the charge) "has been stolen that were found at his place, in his possession, that would assist you in coming to a conclusion as to what your verdict should be Another passage was, "But in cases of receiving with a guilty

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knowledge the onus of proof is thrown upon the defendant, and not upon the prosecutor."

Appellant had been eleven years in London, and this was his first conviction. In the circumstances, even if the Court should think that the sentence of six months should stand, the sentence of deportation should be quashed. Expulsion was not intended for a case of this sort.

Bray J.: The appeal as to misdirection, a point of law, has not been set down, but we will deal with it. It seems to us there was ample evidence to shew that the appellant received the bicycle with guilty knowledge. As to the alleged misdirection in law, though a little vague, it amounts to nothing material. Taking it as a whole, there is nothing to object to.

In the circumstances of the case, there being other matters alleged against the appellant, we will not interfere with that portion of the sentence recommending his deportation.

Application dismissed.

Solicitors for the Applicant—*Oxenburg & Moulder.*

John James Brinsley.

JOHN JAMES BRINSLEY.

The Court will not hear fresh evidence if it is satisfied from the proofs of the proposed witnesses that their evidence would not have affected the result of the trial.

Appeal from an order of Phillimore J. refusing leave to appeal against conviction, and application for leave to call further evidence.

Appellant was convicted at Dorchester Assizes on January 17th, 1910, before Lawrance J. on two indictments, of burglary and arson, and sentenced to four years' penal servitude.

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E. Duke for the appellant (under s. 10 of the Criminal Appeal Act), who was not present.

The only evidence of the burglary was footprints found near the premises where the burglary took place which corresponded

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with the footprints of appellant. There are five witnesses appellant wishes to call who can prove that he was going to Weymouth at the time, and that at the time the rick was on fire he was two and a half miles away talking to a police officer. The witnesses have not yet been approached, so it is impossible to give any idea what they will say.

The Court ordered the application to be adjourned for a fortnight so that the witnesses might be communicated with.

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E. Duke for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. Appellant, having been committed on Saturday, January 15th, and tried on the following Monday, was convicted because he had not sufficient time to call witnesses who would prove an *alibi*. The proofs of the witnesses he desires to call are now before the Court, having been taken by the officer of the Court. Those witnesses would have proved an *alibi* if they had been properly examined. Applicant was not defended by counsel. Some of the police evidence is in his favour, but some of the evidence taken by the police is most unsatisfactory .

[PICKFORD J.: The proofs of the non-police witnesses were not taken by the police, but directly by the officers of this Court.]

Nearly all those witnesses are seeking to excuse themselves. The footprints were very scanty and the ground was wet and slushy

[BRAY J.: But the applicant says he was not wearing the boots produced that night.]

In any case four years' penal servitude is a very severe sentence.

PICKFORD J.: The Court, which was differently constituted on the last occasion, adjourned the application until to-day in order that the evidence which the prisoner proposed to call might be investigated. He was committed for trial on the 15th, and tried on the 17th January, and the Court, in view of the statement that he had not had time to get his witnesses to prove an *alibi*,

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thought that they might like to hear what the proposed witnesses would say. Enquiries have been made from those witnesses, and we are satisfied that, even had they been called, it would have had no effect upon the verdict of the jury. One cast of the applicant's footprint was produced to the Court last time, and there was clearly evidence to go to the jury.

Application dismissed.

John Brown.

JOHN BROWN.

As a general rule, the Court will not allow a witness who could have been called at the trial to be called on appeal.

Police reports made by order of the Court should be supplied to the appellant.

This was an application for leave to appeal, refused by Phillimore J., against conviction and sentence, and to call further evidence. Applicant was sentenced on 14th January, 1910, at the Central Criminal Court by the Recorder to five years' penal servitude for shop-breaking.

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G. St. John McDonald for the appellant (under s. 10 of the Criminal Appeal Act), who was not present.

This was the case of the burglary of a cash chest from the premises of a sub-post office at 84, Goswell Road, on the night of the 8th December, 1909. The safe was carried to 79, Rosebery Avenue, where the other prisoners were arrested. Six other prisoners were concerned with applicant and arrested on that night. Applicant was arrested fourteen days after, and at the trial pleaded an *alibi*.

Detective Laing swore that he saw John Brown there, actually hacking at the chest, but said that he escaped.

[Darling J.: We do not grant leave when there is a conflict of evidence where the case has been properly left to the jury.]

If what detective Laing said was true, the applicant could easily have been arrested, as he lives only a few minutes' walk

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John Brown.

from where the burglary took place, and his address was well known to the police.

Four of the detective officers called by the prosecution are actually attached to the police station at Holborn, the district into which the safe was taken, and where the applicant lives, and has lived continuously for the past three years.

Detective Laing stated that a description of applicant had been circulated on 9th December. The four detective officers in question actually knew applicant's address, and could have arrested him at once, without waiting for a fortnight.

The Court ordered an adjournment of the hearing for a fortnight to enable the officers of the Court to make enquiries as to the steps the police authorities had taken, and to ascertain whether the four detective officers mentioned knew the applicant's address, as had been stated, and, if necessary, to call them.

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St. John McDonald for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The circumstances are somewhat peculiar. Seven men, including Brown, were indicted for breaking into a sub-post office in Goswell Road, and with stealing a safe there, on the night of the 8th December last. The safe was removed into a back room at 79, Rosebery Avenue. In the early morning of the 9th December a police officer stated that he saw from a wall in the rear of the house in Rosebery Avenue all the prisoners trying to break open the safe. All except Brown and Owens were caught in the house. Owens was pursued and caught a short distance from the house; Brown was not caught till fourteen days later. An *alibi* was urged for Brown—that he was keeping up his mother's birthday throughout the whole of the night of the occurrences referred to, and his mother, sister, and Mrs. Campbell, an independent witness, were called to prove it, and their evidence was not shaken. One of the jury asked if Brown's landlady was to be called. The landlady was not called, applicant stating that there was no time, and that he thought that the evidence was sufficient to establish an *alibi* without her aid. The learned Recorder misdirected the jury in telling them that two or three persons had seen Brown, in making his escape from the house, whereas only detective Laing had sworn to having seen him.

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[Bray J.: Why did you not stop the Recorder and call his attention to the mistake in the evidence? That is not a misdirection.]

Only one officer, Laing, said he had seen Brown, and it was a misdirection to tell the jury otherwise.

[Pickford J.: The officer Leach also identified Brown. In looking through the window he said he saw all the seven prisoners. Brown was one of those seven.]

Leach stated that he knew Brown by name, but not by sight, and that he had not seen Brown at the time; the only officer who could have seen Brown, then, was Root, who stood in the doorway when Brown and Owens were said to have rushed out, but he said he had not seen Brown.

Since the adjournment of the application, the Police Commissioner has made a report, which is now before the Court. The Commissioner took the view that the report was to be treated as confidential, and for the Court only, and not for counsel, unless the Court should otherwise direct, but that the substance of the report might be supplied by the Registrar to counsel, and this had been done.

[Bray J.: You shall see the report.]

I have been supplied with the extracts, but not with the whole report.

[Pickford J.: We directed the enquiries to be made through the officers of the Court.]

The report shewed that all the police officers knew the address of Brown, who lived quite close to the police station, and yet they did not arrest him until a fortnight after the date of the occurrence; and in the description of him circulated by the police "the last address"—invariably inserted—was omitted. Counsel urged that it was a highly irregular course to place confidential police reports before the judges and not before counsel, as they

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might unfairly influence the bench. Police reports must have a certain amount of bias.

[Bray J.: We are always on guard against a touch of bias in police statements.]

I ask leave to call the landlady, a lodger, and men who saw Brown in his usual haunts within the fourteen days, to shew that he was not in hiding.

[Bray J.: You did not call the landlady at the trial.]

An opportunity of proving the *alibi* should now be given me. I submit there has been a grave miscarriage of justice.

Pickford J.: This application was adjourned in order that enquiries might be made in regard to certain witnesses the applicant wanted to call. He was convicted of having been concerned in shopbreaking and stealing a safe. His counsel has argued that only one witness identified Brown. We think he put a wrong construction on the evidence of Leach, who said he saw all the prisoners; and the prisoners included Brown. His words mean, "I saw all those prisoners, and I identify them all." The applicant has been convicted, although he called several witnesses to establish an *alibi*. The jury did not believe the persons called to prove the *alibi*. As to the alleged misdirection, it is merely a misstatement of the evidence. That misstatement of the evidence was not substantial. The applicant now wants to call evidence to prove that, although the detectives knew where he lived, they did not arrest him until a fortnight after the offence. He also wishes to call persons, including the landlady, to corroborate the evidence of the *alibi*. When an application is made for leave to appeal and to give fresh evidence, and names have been given, we cannot admit the evidence of persons whose names were not given when the application was made.

As to the police reports, the substance of them was conveyed to the applicant. There is nothing in the full reports that would assist him, though it would have been better if the full reports had been given to him.

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As to the absence of the landlady, the jury asked if she was to be called, and the Recorder, in summing up, commented on the fact that she had not been called. The prisoner should have told counsel that he wanted the witness, and there was time to apply to the Recorder for a short adjournment to enable her to be called. The applicant said he did not think the landlady necessary for the establishment of the *alibi*. It would only be in exceptional circumstances that we should allow an application for such a witness to be examined on the hearing of the appeal. The absence of the other witnesses to corroborate the witnesses for the *alibi* produced no miscarriage of justice.

Application dismissed.

Edmondson Metcalfe

EDMONDSON METCALFE.

Severity of sentence.

This was an appeal from an order of Phillimore J. refusing an extension of time, and an application for leave to appeal against sentence. The prisoner pleaded guilty on January 5th at the Lancashire (Preston) Quarter Sessions, to three indictments for shopbreaking, housebreaking, and larceny from a safe respectively. He admitted fourteen other charges (the value of the property stolen from various places in the district being about £126) which were taken at his request into consideration in passing sentence. He had been convicted eight times previously of larceny. A complete set of housebreaking implements was found in his possession. He was sentenced to seven years' penal servitude.

The appellant, who was not present, had sent a written statement, from which it appeared that he was thirty years of age, and he complained that other persons who were concerned with him in the charges to which he pleaded guilty received lighter sentences. He did not make this application till February 7th, as he had been advised to petition the Home Secre-

tary, and at first intended to do so. The severest previous sentence was twelve months' imprisonment with hard labour.

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Application dismissed.

WALLACE CONDON.

Wallace
Condon.

Habitual criminal—Mere shortness of interval between last release from prison and the next subsequent arrest is not necessarily a bar to conviction as a habitual criminal.

This was an appeal from an order of Phillimore J. refusing leave to appeal against conviction as a habitual criminal. Applicant pleaded guilty to burglary and was convicted of housebreaking and of being a habitual criminal on the 5th February at the Middlesex Sessions, and was sentenced by the Chairman to three years' penal servitude and to five years' preventive detention. He had been sentenced to three years' penal servitude and two years' police supervision in August, 1907, and had been only six and a half weeks out of prison before the commission of the offences on January 9th and January 14th respectively. He was released on November 29th, 1909. There were four previous convictions, all for larceny—in February, 1903, April, 1904, July, 1905, and August, 1907.

L. G. H. Horton Smith for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The evidence is not sufficient to justify the conviction as a habitual criminal The only evidence on that point is that out of the twelve times when he was seen late at night by a police-officer, West, he was, on two or three of those occasions, at Piccadilly Circus, with a man whom West did not know, but who, he said, was an undesirable associate, and the associate of undesirable persons. It was not suggested that applicant was ever seen with any of these latter, nor that on those two or three occasions when West had spoken to him he had been doing anything wrong. West's direct evidence was to the effect that if applicant was himself an undesirable character, it was on grounds quite other than those of

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criminality. Applicant, it was true, in his six weeks of liberty, had not succeeded in getting work, but, in cross-examining West, he stated inferentially that he had tried to get it, and in addressing the jury he stated that on Christmas Eve he had received money from his relatives.

[BRAY J.: Is not the fact that the applicant committed two offences soon after he came out of prison a *primâ facie* proof of his being a habitual criminal?]

I submit not. It is a question of degree. It is a question whether a period of six and a half weeks is of sufficient importance to be considered, and if so, whether during that time he was leading a persistently dishonest life.

[BRAY J.: The prisoner did not go into the box to give any explanation of his movements.]

Counsel referred to *Turner*, 74 J. P. 81; 26 T. L. R. 112; 3 Cr. App. R. 103 (1909); *Waller*, 74 J. P. 87; 26 T. L. R. 142; 3 Cr. App. R. 213 (1909); *Kelly*, 26 T. L. R. 196; 3 Cr. App. R. 248 (1909); *Rowland*, 26 T. L. R. 202; 3 Cr. App. R. 277 (1909); *Baggott*, 26 T. L. R. 266; 4 Cr. App. R. 67, above (1909).

BRAY J.: We think there must be no leave to appeal. Three previous convictions had been proved against the prisoner, one in 1904, one in 1905, and the last in 1907, when he was sentenced to three years' penal servitude. All these were cases of larceny. He came out of prison six and a half weeks before the 9th January last, when he was proved to have received goods well knowing them to have been stolen; and he pleaded guilty to burglary on the 14th January. When there are three previous convictions of this kind and two more offences are committed after an interval of only six or seven weeks, there is some evidence for the jury of the prisoner's leading a persistently dishonest life. If an offence were committed within a week or a fortnight of coming out of prison that might be enough (*Waller*, *Turner*, above). It is, of course, a question of degree. When you get six months' interval, further evidence is required; but when only six and a half weeks have elapsed before the commission of two of-

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fences of a similar character, as in the present case, neither of which can be considered as a matter of sudden temptation, that evidence is alone sufficient. Here there was something more to be considered. West, the police officer, deposed that on one occasion the prisoner told him that he had nothing to do, and that he, West, gave him a shilling or two, and that subsequently he saw the prisoner with an undesirable character. The prisoner knew how he had been spending his time, and, though challenged to do so, he did not go into the box and give an account of himself. The case was left very fairly to the jury, and they were entitled to find that he was a habitual criminal.

Application dismissed.

WILLIAM PRATLEY.

William Pratley.

Clear mistake in summing up a ground for leave to appeal.

Appeal from an order of Phillimore J. refusing leave to appeal against conviction and sentence, and application for leave to call further evidence. The prisoner was convicted on the 5th February at the Middlesex Sessions of stealing a gig, and sentenced by the Chairman to five years' penal servitude.

H. Gundry for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The applicant hired a trap on the 1st December last to go to Greenwich Hospital to see a friend. His story was that he went into a public-house to have a drink, and when he came out he could not find the trap or his goods. There was a friend driving with him, and he had never seen the friend or the trap since. The trap was subsequently sold at Southall market by an auctioneer. The latter had not been called as a witness, and the Chairman, in summing up, told the jury that the prisoner had sold the gig, though there was no evidence that the prisoner had sold it. That was a misdirection.

Bray J.: The statement of the learned Chairman that the applicant sold the gig is unsupported by the evidence. In this case there must be leave to appeal and to call one witness.

Applications granted.

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JAMES MOSS.

James Moss. *User of a place by a person not the owner or occupier for the purpose of betting with persons resorting thereto is not within sect. 3 of 16 & 17 Vict. c. 119, the Betting Act, 1853, unless the sanction of some one in authority or his servant is proved.*

This was an appeal against conviction, on the certificate of the trial judge. The appellant was tried on January 28, 1910, at the Oldham (Borough) Quarter Sessions for unlawfully using on the 5th, 10th, 11th, and 12th November, 1909, a certain room in the Friendship Hotel, Mumps, for the purpose of betting with persons resorting thereto, in contravention of 16 & 17 Vict. c. 119, s. 3, and was sentenced by the Deputy-Recorder to pay a fine of £20, or in default to two months' imprisonment with hard labour.

Roe Rycroft for the appellant: The substantial ground of appeal is misdirection. The Deputy-Recorder told the jury that ready-money betting was unlawful; that "if a man carries on the business of betting, and uses a particular room for the purpose, it is evident he was 'using' the room for the purpose of betting;" that the landlord, though he might not have known of the betting, was responsible, and the maxim, *qui facit per alium facit per se*, applied equally to civil and criminal proceedings; that if the jury thought the defendant was using the premises for the purpose of ready-money betting, they might convict him. All these were misdirections, and the Deputy-Recorder did not point out to the jury, as he ought to have done, the distinction between the popular meaning of the term "use" and its meaning in the sense of the statute. Betting is not prohibited, nor does the statute affect to deal with the betting of people unconnected with the house: *per* Halsbury C. in *Kempton Park* case (below). In *Deaville*, (1903) 1 K. B. 468; 72 L. J. K. B. 272; 88 L. T. 32; 51 W. R. 604; 67 J. P. 82; 20 Cox C. C. 389; C. C. R., it was held that where a bookmaker was in the habit of frequenting the bar of a public-house for the purpose of ready-money betting, but did not occupy any specific part of the bar, the question whether he "used" the bar for the purpose of betting depended on whether he carried on the betting business there with the knowledge and permission

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of the occupier of the house. There must be something in the nature of a licence, mere knowledge on the part of a servant would not be enough. You must have some exclusive right to use the place as against the public; *Powell* v. *Kempton Park Racecourse Co.*, (1899) A. C. 143; 68 L. J. Q. B. 392; 80 L. T. 538; 47 W. R. 585; 63 J. P. 260; 19 Cox C. C. 265; H. L. There must be some localisation, with the knowledge or permission of the licensee or of some person clothed with the landlord's authority. Here the barman, Kershaw, was expressly forbidden to allow betting, and could not, therefore, give the necessary permission.

[He was stopped by the Court.]

G. Jordan for the respondents: There was evidence that the servants in charge of the hotel—Kershaw and Bramley—knew that appellant was carrying on the business of betting in the room. If so, the consent of the servants was sufficient, as the servants, Kershaw and Bramley, were barmen who were in charge of the room in question, and the evidence shewed that the landlord did not personally attend to this room. Kershaw and Bramley were the real persons in authority in this particular room. Counsel cited on this point the judgment of L. Alverstone C. J. in *Deaville* (above).

[Bray J.: The Deputy-Recorder does not lay down the law anywhere as to whether or not the jury should be satisfied that the betting was carried on with the knowledge of Kershaw and Bramley.]

There was evidence that Kershaw was in charge of the room. It was not a misdirection; if anything, only a non-direction.

[Bray J.: A non-direction is most important in a criminal case.]

I submit that on the four days there was evidence of betting which, if it had the sanction of the landlord, would entail the consequences mentioned in the statute.

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PICKFORD J.: The defendant was convicted of unlawfully using the room for the purpose of betting with persons resorting thereto. What was proved was that he betted with persons resorting to the room with the knowledge of persons in charge of the bar, although such persons had been forbidden to allow the use of the room for betting. The question has been raised whether the user of the room without the consent of the landlord personally would be enough to sustain a conviction; but on the facts of this case it is not necessary to decide that point. Here it is enough to assume that the user took place with the sanction of the persons in charge, but was that question properly put to the jury? I am of opinion that it was not. The Deputy-Recorder, in summing up, said: "What the law forbids is ready-money betting. . . . . The landlord must be responsible for the acts of his servants. . . . If you think he was using the premises for the purpose of ready-money betting, say he is guilty." He did not define "use" within the meaning of the Act; and though he employed the word "use" many times, he did not point out that it must be user with the sanction of the landlord or of his servants. The jury may have thought that mere use of the premises in the ordinary way was enough to justify a conviction, and that the sanction of the landlord or his servants was not necessary. They may also have thought from the summing-up that the defendant was liable in any case if he carried on ready-money betting in the room. The conviction must be quashed.

Conviction quashed.

Solicitor for the Appellant—*John Chadwick*, Oldham.
Solicitor for the Respondents—*The Town Clerk of Oldham.*

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE PHILLIMORE AND MR. JUSTICE BUCKNILL.

GEORGE MITCHELL.

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George Mitchell.

Severity of Sentence.

Appeal from an order of Bucknill J. refusing leave to appeal against sentence, and an application for leave to call further evidence. Appellant was convicted at Devon Assizes on January 31st, 1910, of felonious wounding, and sentenced by Bray J. to ten years' penal servitude. He was not present.

PHILLIMORE J.: The applicant has made several applications and statements, some of which have only come in to-day. We have a report from the learned judge who tried the prisoner. He attacked the prosecutrix with a razor, and it was by a mere accident she was not killed. Till 1861 this offence was punishable with death, and people still living remember that sentence being carried out. And after all, if a man intends to murder and does his best to commit the crime, he is morally as guilty as if he had succeeded. In the circumstances of the case, the Court does not think the sentence too severe.

Application dismissed.

WILLIAM FROGGATT.

William Froggatt.

When the defence sets up an alibi, *it may be contradicted (even as to an immaterial date) by rebutting evidence.*

There is (semble) *no objection to a prisoner being arraigned on an indictment under s. 7 of the Prevention of Crimes Act*, 1871, *alleging a previous conviction, after he has been tried on another indictment found at the same time.*

Application for leave to appeal against conviction referred to the full Court by Bucknill J., and for leave to call further evi-

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dence. Applicant was convicted at Leicester Borough Sessions on February 8th, 1910, of stealing from a dwelling-house, and sentenced to six years' penal servitude. A second indictment for breaking and entering another dwelling-house was not tried.

Lipson Ward for appellant (under s. 10 of the Criminal Appeal Act), who was not present. The evidence of identification of the prisoner was not sufficient. What convicted him was that the jury knew that he was a man of bad character, and had served five years' penal servitude. There were three indictments against him, and, when arraigned, in presence of the jury, he pleaded guilty to the third indictment, which was under s. 7 of the Prevention of Crimes Act, 1871, and charged him with being found in a public place in such circumstances as to shew that he was about to commit an offence punishable on indictment, and not guilty to the first and second before the first was tried. Thus, when given in charge to the jury to take his trial upon the first indictment, to which he pleaded not guilty, the jury were seised of the fact, on his own confession, that he was a criminal.

[DARLING J.: How can that be avoided?]

The prisoner having pleaded guilty before the magistrate of the charge in the third indictment, the officer of the Court should not have called upon him to plead to the latter indictment until after a verdict had been returned on the first indictment. He was defended on the first indictment. The pleas were taken in the customary way, and I do not suggest that in law anything was wrong; but I complain that a charge to which the prisoner pleaded guilty was brought to the cognisance of the jury before they tried him on the charge of which he said he was not guilty. Before he pleaded the jury knew he had been sentenced to five years' penal servitude, as this fact was alleged in the third indictment.

[PHILLIMORE J.: We have a report from the Recorder. He pleaded to three indictments, and he was in no way prejudiced. It is usual to take pleas as early as possible, in order to release witnesses.

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DARLING J.: He could have pleaded "not guilty" to all the indictments.

BUCKNILL J.: Counsel might have asked to have this plea taken later.]

As to the evidence of identification, there were four witnesses, two of whom did not see his face and would not swear that applicant was the man; as to the other two, one of them did not see his face but recognised his peculiar walk, and the other, who had a momentary glance at his face, said he recognised him at the police station by his face.

[PHILLIMORE J.: You say the identification was not complete; but the evidence was proper evidence for submission to the jury; and you have not referred to the evidence of the police constable who arrested the prisoner.]

The constable stated in his evidence that burglarious instruments were found upon him when he arrested him. He was not arrested on the charge on which he was convicted, and such evidence was inadmissible and unfair, and went to prejudice only, as there was no connection between the crimes charged and the possession of any of those instruments. When the instruments found upon him had nothing to do with the crimes, they should not have been put in evidence.

[PHILLIMORE J.: Having been arrested on one charge, these things were found upon him; then he is charged with another crime.]

Suppose a man is arrested on a charge of burglary, and several days afterwards the police charge him with having obtained money by false pretences. It would be unfair upon his trial for the false pretences to give in evidence the fact that, when arrested, he had house-breaking implements upon him. The possession of the latter could not be evidence of the false pretences; they do not bear upon the charge.

Another point is that, before the magistrate, the appellant's defence was an *alibi*. On his trial before the Recorder he went

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into the witness-box, and told the same story. The material point was whether he was at Leicester on the 6th January. He said he was not, but that he was at Birmingham, and did not come to Leicester until the 19th January. He was cross-examined whether he was in Leicester on the 11th January, and he said, "I came to Leicester on the 19th, I was not there on the 11th January." The prosecution were bound by his answer, and should not have been allowed to call in rebuttal evidence of a person to contradict him, who said that he slept in an inn at Leicester on the 11th January. The prosecution had closed their case, and rebutting evidence can only be given where the evidence given by the prisoner comes as a surprise and is entirely new matter. *Frost*, 9 C. & P. at 159 (1840); Monmouth Special Commission.

[PHILLIMORE J.: I ruled that point the first time I went on Circuit. You do not know what a prisoner is going to say in his defence. In some cases it would be impossible for the prosecution to deal with the *alibi* except by way of rebutting evidence, because the prosecution does not know that at the trial the prisoner may not set up some defence other than and inconsistent with an *alibi*, even though before the justices he set up an *alibi*. The case I refer to was a charge of rape. Before the justices prisoner set up an *alibi*; before me he set up consent.]

The fact that he was in Leicester on the 11th January was not material, and did not shew he was there on the 6th January. The evidence given only affected applicant's credibility, and was inadmissible. The date was fixed by the witness referring to a book kept by his wife. The wife was not called, and the contents of the book were improperly received in evidence.

[DARLING J.: It was not to shew that prisoner was a liar, but to shew that he was at Leicester, that the prosecution gave evidence of his having been at Leicester on the 11th.]

I ask leave to call further evidence, the evidence of a nephew and niece of the appellant, to prove that he was at Birmingham on the 6th January. The proof of these witnesses was taken by applicant's solicitor, and was before counsel on the trial. The

witnesses attended the Sessions the first day, but they were absent the second day, when he was tried.

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Bucknill, J.: The applicant was charged at Leicester Borough Sessions on three indictments. The first was that on which he was tried; and he complains that the jury heard him plead guilty to the third, and may have been prejudiced against him on his trial. But the procedure of which he complains has been in existence a number of years. It is the custom of the Court, and we think that there is no substance in the prisoner's complaint. If he felt any apprehension before being called upon to plead, his counsel might have got over the difficulty, if any, by asking the officer of the Court not to call upon the prisoner to plead to the third charge until the first had been disposed of. As to the evidence of identification, the witnesses were remarkably fair, and two of them identified him by a peculiarity of movement. Without saying that the evidence of identification was strong, we think that it was certainly proper evidence for the jury. His counsel has also contended that the revolver and other instruments found upon him at the time of his arrest should not have been produced in evidence against him. But surely for years it has been the custom for police witnesses who arrest prisoners to say what they find upon them. Such evidence is admissible, but its weight is another matter, and that is for the jury. It has also been complained that the evidence of the licensed victualler as to January 11th, instead of having been given in chief, was given in rebuttal. But we think that the prosecution were justified in the course they took, and applicant has no grievance on this head. As to the application for leave to call further evidence, it has been stated that a nephew and a niece of the prisoner gave their proofs for him at the trial, to the effect that on the 6th January he was not at Leicester, but at Birmingham. These witnesses came to the Court the first day, but they were not there the day of the trial. If there is any reason why these witnesses were absent, it is not for the prosecution to shew why they disappeared, but it is for the defence to shew why they were not present to give their evidence. In the circumstances of the case the production of the hotel book by the licensed victualler did not injure the applicant, as the jury were told that it was immaterial, and his evidence was properly admitted in rebuttal—though if this evidence had been

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tendered in chief I doubt whether it would have been admissible. The jury were directed to confine their attention to the question of identity, and there has certainly been no miscarriage of justice within the proviso to s. 4 (1) of the Criminal Appeal Act.

Applications refused.

George Jennings.

GEORGE JENNINGS.

Habitual criminal—An indictment for being a habitual criminal under the Prevention of Crime Act, 1908, must be tried immediately after the primary charge.

This was an appeal from an order of Phillimore J. refusing leave to appeal against conviction as a habitual criminal, an application for leave to call further evidence, and an appeal against sentence. Appellant was indicted on the 28th January, 1910, at West Ham Borough Sessions for housebreaking, and on this count and another charging a previous conviction he pleaded guilty, but pleaded not guilty to the charge of being a habitual criminal. He was found guilty and sentenced to three years' penal servitude, and to five years' preventive detention.

F. St. John Morrow for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. Having regard to the previous convictions, I think that in this case I cannot reasonably contend that the sentence of three years' penal servitude was excessive.

[PHILLIMORE J.: It follows that the sentence of five years was not excessive if there was evidence of previous convictions, and that the prisoner was persistently leading a life of crime.]

As to the evidence of his being a habitual criminal, the statutory notice served upon him in prison stated "that you made no effort to obtain any honest employment in the interval of liberty." That puts the burden of proof upon the Crown to satisfy the jury that the prisoner made no effort to obtain honest employment. Now, he came out of prison on the 11th June, 1909, and the house-

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breaking was in December, 1909. Therefore, he was six months out of prison before his arrest, and the prosecution produced no affirmative evidence to the jury on which they could safely convict. The statutory notice is a seven days' notice before trial, and the prisoner applied to the Recorder to postpone to a later sessions the trial of the indictment for being a habitual criminal, on the ground that as he worked in different places in the country, the period of seven days was too short to enable him to get the witnesses he wished to call.

[PHILLIMORE J.: As the law is at present, when a prisoner is found guilty of the first charge, the charge as to being a habitual criminal must be tried at the same sessions, and cannot be postponed. You cannot split an indictment. I have written to the Home Secretary as to the desirability of a change in the law so as to enable a postponement to be made in a proper case.]

The notice of appeal states the names of two employers with whom applicant says he worked during last autumn, and the police have made enquiries, with the result that a letter dated the 15th February has been received from a Mr. Martin, shewing that the prisoner worked for him a short time during the fruit season. There is also a letter from a Mr. Reeves, shewing that applicant was hop-picking in the autumn.

I also complain of one passage (and only one) in the summing-up. The learned Recorder told the jury: "Therefore, you have a man here who is a criminal, or whose habits are criminal, seeing that six months only elapse since he last came out of prison, and he is committing this offence, and seeing also that the police can gain no information about him as to his ever doing any work." I submit that those words were practically a direction to the jury to convict, and it was not fairly left to the jury to say whether or not he was guilty of the charge of being a habitual criminal.

John Montefiore, for the Crown, was not called on.

DARLING J.: Counsel for the appellant properly gave up the appeal against the sentence, and confined his argument to the question whether the appellant had been rightly convicted upon

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the evidence under the recent Act as to preventive detention. The prisoner was released from prison on the 11th June, 1909, and the housebreaking for which he was indicted was in December of the same year; and it was alleged against him that in the interval between those two dates he made no effort to obtain honest employment. It appears to us that there is some evidence that he did pick some fruit and some hops. But has there been a miscarriage of justice? If a man occupies a day or two of his time in doing work, that does not prevent him from being a habitual criminal. The word "habitual" is used in other collocations than in the phrase "habitual criminal." For instance, it is applied to drunkards, but a habitual drunkard does not mean a person who is never sober. Drunkenness is not continuous, nor are the acts of committing crimes. As to the summing-up to the jury, there were some expressions which went beyond the necessities of the case; but we do not think that there has been any miscarriage of justice. After the charge of housebreaking had been dealt with at the trial, the appellant applied to the learned Recorder for the postponement of the trial of the charge of being a habitual criminal in order that he might have an opportunity of calling witnesses. The Recorder did not grant the application, for he could not do so. The only way the Recorder could have acceded to that application, seeing that the charge of being a habitual criminal is part of the indictment on the primary charge, would be, before verdict, to discharge the jury from returning a verdict, and at the ensuing sessions to try the case over again. That would have been a drastic course to take. It is, however, a defect in the Prevention of Crime Act, 1908, that it does not allow the charge of being a habitual criminal to be adjourned on the application of the prisoner in a proper case. This Court desires to suggest for the consideration of the Home Secretary whether it would not be desirable to amend the Act so as to allow such a course to be taken. But in this case, even if an adjournment could have been granted, it would have been of no advantage to the appellant.

Appeal dismissed.

HARRY POPE.

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It is not a misdirection to explain to a jury that the presence or the absence of an "intent to defraud" means broadly a distinction between dealing honestly and dishonestly.

Severity of sentence.

This was an appeal against conviction on grounds involving questions of law, and an application for leave to appeal, on grounds of fact, against conviction and sentence. Appellant, who was a justice of the peace for the county of Norfolk, and chairman of the Downham Market Urban District Council, was convicted before Jelf J. at the Norfolk Assizes at Norwich, of misappropriation of a trust under s. 80 of the Larceny Act, 1861, and after trial on the 26th, 27th, and 28th January, 1910, was sentenced to three years' penal servitude.

The case for the prosecution, as appeared from the shorthand transcript of the trial, was, that appellant and his brother were trustees under the will of Ezra Pilgrim, who died in January 1904.

During several years he was spending large sums in the purchase of real estate, and for this purpose created an overdraft of many thousands of pounds at his bankers. In 1904 and 1905 his bankers were continually pressing him to reduce the overdraft. He on several occasions promised to do so, but was unable to carry out his promises.

Between August, 1905, and November, 1905, for the purpose of reducing his overdraft, he paid into his own account sums belonging to the trust estate, amounting to £9,500.

On 22nd November, 1905, he signed a document, stating that he deposited with himself and his brother the deeds of six distinct properties as security for the loan of £9,500.

The document and the deeds remained in his own possession, and he afterwards pledged the deeds of five out of the six properties to different people for his own benefit, leaving, however, the sixth and most valuable, known as the Crow Hall Estate, untouched.

In 1906 his overdraft again increased, and the bankers were again pressing him to reduce it. Between March, 1906, and August, 1906, he in the same way as before paid into his own account sums belonging to the trust estate amounting to £9,010, all of which was absorbed by the overdraft.

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He never paid any interest on either of these sums, and for the second sum, £9,010, he gave no security at all, for two and a half years, but on 6th March, 1909, he made out another similar document depositing with himself and his brother the deeds of Crow Hall, and the deeds of another unencumbered estate, and giving himself and his brother a second charge upon a number of other properties already mortgaged or pledged to the bankers and other people.

On 30th March, 1909, he filed his petition in bankruptcy.

Ernest E. Wild (with him *H. Claughton Scott*) for the appellant, who was present. The indictment contained various counts charging the appellant with offences alleged to have been committed from August, 1905, to April, 1907. The defence was that there was no intent to defraud. The facts of the case are peculiar. The accused was a man of considerable property, having obtained through his father's will a sum of £30,000. In January, 1904, Ezra Pilgrim died, leaving a will under which the accused and his brother (against whom no charge has been made) were trustees. The trust estate which came under the control of the trustees was £20,000; the accused alone was the active manager of the trust, and his brother had little if anything to do with it. The accused had a mania for investing in house property. He invested the whole of his own money in that way, and also the whole of the trust money. Under the will of Ezra Pilgrim he had power to invest in real and leasehold securities. He never sold any land; he was always a buyer. He had a large overdraft at his bank, and having been pressed to reduce the amount by the bank, he felt constrained to file a petition in bankruptcy. The overdraft had been secured by deeds, &c., of the value of £20,000.

[PHILLIMORE J.: He became a trustee in January, 1904, and the first time he touched the trust fund was in August, 1905.]

Yes; and a trust account was opened at the bank, and the trust moneys paid into it.

W. H. Leycester, for the Crown: The first sum of £1,600 trust money did not pass through the trust account at all, and there were other sums which did not go into that account.

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Wild: A sum of £18,500 trust money was appropriated by the appellant for investments in land. There was undoubtedly a breach of trust fit for proceedings in a civil Court, but the learned judge at the trial confused the proceedings of a Chancery Court with the proceedings in a criminal Court. In July, 1905, an estate, called the Crow Hall estate, came into the market, and appellant considered that it would be a good investment for the trust money.

[PHILLIMORE J.. But the conveyance of that estate was to the appellant alone, and not to him and his co-trustee.]

He purchased the property and mortgaged it, along with five other properties, to the trust. Up to March, 1906, there were only irregularities. Eventually all the property which had been subject to the trust through a declaration of charge made by the prisoner was withdrawn from the charge with the exception of the Crow Hall estate. That need not have been necessarily more than an ordinary breach of trust, not a fraudulent breach of trust. On the eve of his bankruptcy he executed a document of charge dated 3rd March, 1909, in favour of the trust, to secure the sums so appropriated together with the interest on those sums, and at that date the accused thought he was solvent. He had paid no interest upon the sums appropriated into the trust amount. The statement of his affairs shewed an estimated surplus of over £4.000. This man, who was compared by the learned judge to an ordinary thief, has not benefited by a farthing by these transactions. He bought the properties in his own name and mortgaged them to the trust.

[PHILLIMORE J.: He did not execute a regular mortgage to the trust; he simply signed a piece of paper—which he kept in his own possession—declaring that such or such securities belonged to the trust. A dishonest trustee might get rid of such a document and might not hold himself bound by it.]

As to the summing-up, the learned judge tried to explain the "intent to defraud" by reference to dishonesty. He told them that they must be satisfied "that he has done it with a fraudulent intention; in other words, that he has been dishonest." I

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submit that is not a proper direction to the jury—to tell them that to do a thing with a fraudulent intent was the same as to act dishonestly. The learned judge impressed upon the jury the fact that poor men are punished severely for the slightest dishonesty—a consideration which was not only irrelevant, but calculated to prejudice the prisoner, who should have been protected by the judge from any bias in their minds due to a comparison of rich with poor. Again, the learned judge said, "It is quite clear, it is admitted, because it could not be contested, that every farthing of that £9,500 went to his own advantage in cutting down his overdraft at the bank." That was not a fair way of putting it, for the £9,500 went to purchase and improve Crow Hall.

[PHILLIMORE J.: If Crow Hall turned out a good investment, the trust would not have the benefit of it.]

It was a clear misdirection to tell the jury that the intention was "dishonest," which is a dangerous word to use; and the misdirection is not set right by afterwards telling the jury that it is for them to decide. The learned judge throughout put the view of the prosecution very strongly, and he did not put the view of appellant, except to demolish it. Even if the appeal should not be allowed, I submit that sentence should be reduced. The appellant, up to the time of this charge, was a man of excellent character, and he derived no personal benefit from the transactions.

W. H. Leycester, for the Crown, was not called upon

DARLING J.: The appellant was indicted for converting to his own use certain securities which he held as a trustee. His brother left the management of the estate to him. After getting, in 1904, possession of the trust estate, he used it for his own advantage. In 1905 he began to pay and to transfer trust moneys into his own private account at the bank. Before 1907 the defendant withdrew securities from the charge (a declaration of trust) which he had put upon them. This was a charge which no one knew of but himself. He put six securities into a box and withdrew them all except one, thereby depriving the trust estate of the securities withdrawn. In 1908 he transferred his account to another bank,

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and in consequence of the bank requiring the overdraft to be reduced he became bankrupt. The question is not whether by his acts he deprived the trust estate of a large or small amount, but the question is whether, when he converted the securities to his own use, he did so with intent to defraud. His counsel has urged that the summing up was so bad that we ought to quash the conviction. The summing up was forcible, and expressions apt for addressing the jury at the moment were used by the learned judge. Even a judge is not disentitled to use advocacy if it is proper for the occasion. He must see that the balance is held evenly between the prosecution and the defence. If a statement is pressed too hard by the defence, the judge must put it in a proper light for the jury; and the same observation applies to the prosecution. Counsel had criticised many points of the summing up. But almost everything may be criticised. What we must consider is whether the summing up was so one-sided as to lead to the conviction of the prisoner. The evidence, apart from the summing up, appears to us amply to justify the conviction. As regards the "intent to defraud," the judge asked the jury whether the prisoner did it honestly or whether he did it dishonestly. In the first place he used the technical words, and then he gave the popular words which could be understood by the people he was addressing. Isolated passages must be considered in reference to their context and to the summing up as a whole. The critical parts of a summing up are the beginning and the end, like the exordium and peroration of a speech. At the end of the summing up Mr. Justice Jelf said, "But you are dealing with a shrewd financier, who knows what he is about in all the businesses of life, and can you say that he could do all these things—leaving this estate in this condition—without any dishonest intent? . . . . If there is any doubt, of course, the fact of his good character ought to stand him in good stead; but if there is no doubt, if the facts are so clear that 'anybody who runs may read' that he is doing a dishonest thing, then all one can say is that it is another instance of a man of high character and position, owing to the opportunities for robbing other people which present themselves in the course of his life, abusing that position—that in the exigencies of circumstances he has been led to put his hands into the property of others and unfortunately to forfeit the good character which he has hitherto maintained." These and other

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passages have been criticised, but the conviction must be upheld. As to the sentence, we cannot reduce it, as no less sentence could be passed upon a person convicted of being a fraudulent trustee.

Solicitors for the appellant—*Bridges, Sawtell & Co.*, for *Bendall & Co.*, Newmarket.

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GEORGE HEPWORTH.

Despite too strong or immoderate remarks in a summing up, the Court will not quash a conviction unless there has been a miscarriage of justice.

This was an appeal against conviction on grounds involving questions of law, and an application for leave to appeal against conviction on grounds involving questions of fact. Appellant was convicted at Pontefract Borough Sessions on February 4th, 1910, of falsification of accounts, and sentenced to six months' imprisonment in the second division.

Charles Mellor for appellant (under s. 10 of the Criminal Appeal Act), who was not present. Appellant was a clerk in the gas department of the Corporation of Pontefract. He was tried on one indictment under 38 & 39 Vict. c. 24, the Falsification of Accounts Act, 1875, and acquitted; and thereupon the prosecution decided to proceed against him on another indictment under the same Act. In the first count of the indictment the prisoner was charged with omitting from a book called the Register of Automatic Gas Meters the amount of gas consumed by persons residing in certain houses numbered 1 to 22 inclusive in a certain street in the said borough, and the amount paid by each of such persons in respect of the gas; and in the second count he was charged with a similar omission, but in respect only of one of the persons residing in the same street, viz., No. 12. At the end of the day I took the objection that the first count was bad for duplicity.

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[DARLING J.: Do you suggest that there should have been separate particulars as regards each of the twenty-two houses?]

Yes, particulars should have been given of each of the twenty-two houses in the same way as the particulars of the house mentioned in the second count. Still, I do not press the objection. My principal objection is that there was a misdirection in the summing up. The appellant was not an accountant, the books were disgracefully kept, and there was no supervision over him. Collectors were sent round to collect pence in the slot, and returning, they placed the money on the table.

[PHILLIMORE J.: However that may be, your client only initialed the book when the money was counted in his presence. There were several instances to shew a system. In one case he collected from twenty-two houses, and omitted to charge himself in the book with the sums collected.]

The slightest supervision would have rendered the omissions impossible. The money that came in afterwards was put on the table, and was no more received by him than by others.

[PHILLIMORE J.: Your client was indicted for falsification of accounts, not for embezzlement.]

The defence was that there was no intention to defraud, the same as that on the first charge, of which he was acquitted. I did not put him into the witness-box the second time, for it would be merely to repeat before the same jury the evidence he had given before. It was unfair, in the circumstances, for the Recorder to comment on his absence from the box. In summing up, he said to the jury: "He practically stands convicted by the evidence of the prosecution." That is a strong direction.

[PHILLIMORE J.: Very strong.]

He also said to them: "You must do your duty; you must leave the other matter to me."

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[PHILLIMORE J.: Did you say anything that would lead the jury to think that a little fraud on a corporation would not matter?]

No. The learned Recorder never pointed out to the jury that there was no evidence that the appellant had taken money except the inference from his not entering it. Four people had access to the money-box, but I do not make any suggestion against any of them. It is enough for me to say that other persons had access to the box.

J. A. Greene, for the respondents, the Corporation of Pontefract, was directed to confine himself to the point whether the case for the appellant was put fairly to the jury.

Appellant knew what was being done. When giving evidence on the first charge he said: "I knew I was £10 short, and therefore I altered the books to conceal it." That was a plea of guilty in effect. The Falsification of Accounts Act was passed because it was so difficult to prove theft of money. On the first charge the jury came back and gave him the benefit of the doubt.

[DARLING J.: The summing up on that occasion was milder than in the second case.]

The Recorder evidently thought that in the second case he ought to neutralise the effect of some remarks made by appellant's counsel.

DARLING J.: The appellant appeals on two grounds. The first is a point of law, that the twenty-two houses mentioned in the first count should have been split up and not put together in one count. We hold the count to be good. The second is an appeal on the ground that the Recorder did not fairly leave the case to the jury. We have before laid down that a summing up must be fair, and that language proportionate to the occasion must be used. From the beginning of the summing up, one must conclude that appellant's counsel had tried to laugh the case out of Court. He made a very eloquent speech. The Recorder only attempted to administer an antidote. We do not think the summing up a model

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one. All passages in it are not moderate. But when we have to consider whether it was so unfair that we ought to quash the conviction, we do not think we ought. We are unable to say that there was anything in the summing-up which precluded the jury from doing justice. On the evidence the verdict was justified. The sentence will run from the date of the conviction.

Appeal dismissed.

Solicitor for the Respondents—*S. W. Woodhead.*

ROBERT JAMES BROWNLOW.

Robert James Brownlow.

It is a clear misdirection to instruct a jury that a statute under which an indictment is laid does not require an intent to defraud to be proved, when in fact it does.

This was an appeal against conviction by leave of Bucknill J. Appellant was convicted at the Manchester Assizes of obtaining credit by false pretences, and sentenced on the 10th February, 1910, by Mr. Commissioner Avory, K.C., to three months' imprisonment.

The Hon. H. Gorell Barnes for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The defendant was indicted under s. 13 (1) of the Debtors Act, 1869. Briefly, the section enacts that the offence is committed, "if, in incurring any debt or liability, he has obtained credit under false pretences or by means of any other fraud." There were three counts in the indictment charging that credit had been obtained from three persons respectively. The ground on which the conviction ought to be quashed is misdirection on a point of law. The passage of which I complain is: "Now the result is that there are three charges in this indictment which

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you have to inquire into, and those charges are framed under the Act of Parliament which is commonly known as the Debtors Act, which makes it an offence for any person in incurring a debt and liability to obtain credit under false pretences. Now that is the whole offence. The statute does not require the prosecution to prove that it was done with intent to defraud." It is clearly a misdirection, I submit, to have told the jury that it was not necessary to prove that there had been an intent to defraud. The very opposite is the case, and a necessary ingredient of the crime under the Debtors Act is an intent to defraud. The learned Commissioner ought to have asked the jury, "Was it done with intent to defraud?" In support of my submission I rely on *W. Jones*, (1898) 1 Q. B. 119; 67 L. J. Q. B. 41; 77 L. T. 503; 46 W. R. 191; 19 Cox C. C. 87; C. C. R. In that case there was a count in the indictment for obtaining credit by false pretences within the meaning of s. 13 of the Debtors Act, 1869; and Lord Russell C. J., in delivering the judgment of the Court for Crown Cases Reserved, said: "There are three elements which have to be considered in the construction of the statute: first, there must be the incurring of a debt or liability; secondly, there must be an obtaining of credit; and thirdly, there must be fraud; the conjunction of the three ingredients makes the offence."

[PHILLIMORE J.: The words in the section are, "under false pretences or by means of any other fraud." It is, as we have said in another case, almost impossible to conceive how a man could obtain goods from another by false pretences without there being an intent to defraud.]

I also rely on *Muirhead*, 73 J. P. 31; 53 S. J. 164; 25 T. L. R. 88; 1 Cr. App. R. 187 (1908).

[PHILLIMORE J.: But in that case a special verdict was taken by my brother Pickford, so it does not help you much.]

I submit that this Court cannot hold that the third ingredient need not be present.

Gordon Hewart, for the Crown: My submission is that the

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passage complained of is not material upon the question of misdirection. The prisoner admitted in the witness-box that he had got £1,760 from persons to whom he had offered situations. The question the jury asked themselves was, "Was this a swindle?" The single sentence taken exception to in the summing up had no effect on the verdict, which, on the evidence, would have been precisely the same if the jury had been told that to constitute the offence there must have been an intent to defraud. The jury found that the money was obtained by false pretences, and that was sufficient. They were not asked, as the jury were in *Muirhead*, the specific question: was there intent to defraud? The verdict shews in this case that if they had been asked that question they would have answered it affirmatively. Taken as a whole, the summing up was perfectly fair, and the learned Commissioner throughout did all he could for the undefended prisoner.

[Bucknill J.: It was an excellent summing-up, with the exception of the words referred to.

Phillimore J.: There are three other counts in another indictment still standing against the prisoner, two of which are not covered by the indictment on which he was tried.

Darling J.: The prosecution have to shew that, notwithstanding the misdirection, the jury would have come to the same conclusion as they did. You can still proceed with the other indictment. Would counsel for the appellant be content with an academic victory and withdraw the appeal? The sentence will have expired before the appellant can be tried again.

Phillimore J.: We cannot bail the prisoner. An application, if deemed advisable, should be made elsewhere.]

I have consulted the appellant, and he thinks that he will go to the jury again if you quash this indictment. He apprehends that if he undergoes this conviction he will be unable to get his discharge in bankruptcy. He prefers to take his chance as to the result of the trial of the other indictment, if this conviction be quashed.

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DARLING J.: The appellant was indicted under s. 13 of the Debtors Act, 1869, under which it is a misdemeanour if, in incurring any debt or liability, a person obtains credit by false pretences or by any other fraud. The Bankruptcy Act, 1883, deals with matters of a somewhat similar kind, making it an offence for an undischarged bankrupt to obtain credit to the extent of £20 and upwards without disclosing the fact that he has not obtained his discharge. On an indictment under s. 31 of the latter Act it has been held that it is not necessary to prove an intent to defraud. I mention this because it is perhaps the explanation of how it was that the learned Commissioner, who has had such great experience in criminal law, should have used the words he did; and I cannot help thinking that by some inadvertence he looked at the section of the Bankruptcy Act instead of the section of the Debtors Act. The learned Commissioner directed the jury that the statute did not require the prosecution to prove that the offence had been committed with an intent to defraud, and that the whole offence consisted in obtaining credit by false pretences. That direction as a matter of law was wrong. There can be no doubt about it, because the point arose in *Muirhead's* case (above), and in *Jones* (above), in which Lord Russell of Killowen held that there must be three ingredients, one of them being an intent to defraud. The jury were told by the learned Commissioner that it was not necessary to prove an intent to defraud. It has been said that obtaining credit by false pretences must import an intention to defraud; but we are not dealing with any such proposition here, but with the direction to the jury that the offence was complete even if the intent to defraud was absent. *Cohen,* 73 J. P. 352; 2 Cr. App. R. 197 (1909), and *Stoddart,* 73 J. P. 348; 53 S. J. 578; 25 T. L. R. 612; 2 Cr. App. R. at 244 (1909), also shew that such a direction was wrong, and the effect of it. The conviction cannot be upheld upon the ground that the jury would have come to the same conclusion if they had been properly directed, because where it is necessary to prove intent it is most important to direct the jury properly; and where the jury have been told that they need not consider a fraudulent intent, we cannot conclude that a conviction would have followed if they had been instructed that a fraudulent intent was a necessary ingredient of the offence. The conviction must be quashed. The prisoner can now be tried again on any indictment standing against him. He prefers to have the

decision of the Court rather than to withdraw his appeal. We have nothing to do with the question of bail.

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Conviction quashed.

ERNEST MOORE.

Ernest Moore.

Severity of sentence.

This was an appeal against conviction and sentence by leave of the full Court. The appellant was convicted in the Salford Borough Quarter Sessions on January 24th, 1910, of breaking and entering a counting-house, and was sentenced by the Recorder to twelve months' imprisonment with hard labour.

Ross Brown for the appellant (under s. 10 of the Criminal Appeal Act), who was present: The conviction was not justified by the evidence. Appellant at one time was a member of the Manchester Ship Canal police. The indictment against him was for breaking and entering a counting-house of the Canal Company. The evidence of identification was extremely weak. It is admitted by the prosecution that he was not in the counting-house with the other two men charged, but it was said by a person who did not see his face that he saw him a few yards away from the counting-house.

[PHILLIMORE J.: But it was not denied by the appellant that up to a point he was a party to the plot.]

His defence was that he withdrew altogether from the plot at the last, and in corroboration, called witnesses to prove an *alibi*—that he was at home between eight and ten at night, when the counting-house was broken into.

[PHILLIMORE J.: But the jury did not believe the witnesses called to prove the *alibi*.]

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S. Pope, for the Crown, was not called upon.

BUCKNILL J.: This is a simple case. For myself, I should have found some difficulty in giving leave to appeal. There was evidence to entitle the jury to convict. The defendant himself admitted that he was in the conspiracy up to a certain point. He was seen on the spot by a witness, who had no doubt as to his identity. The summing-up was fair and accurate. If the appellant had been still in the police force at the time of the offence the sentence would have been penal servitude instead of twelve months' imprisonment. The sentence will run from the time leave to appeal was given.

Appeal dismissed.

BEFORE

MR. JUSTICE LAWRANCE, MR. JUSTICE PHILLIMORE AND MR. JUSTICE HAMILTON.

WILLIAM BUTLER.

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Murder—Circumstantial evidence.
Immaterial misdirection is not a ground for quashing a conviction.

Appeal against conviction on points of law, and application for leave to appeal on grounds of fact and to call further evidence. Appellant was convicted of murder at the Monmouth Assizes, on January 24th, 1910, after a two days' trial, and sentenced to death by Grantham J.

F. W. Sherwood for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The following are the short facts:—William Butler, stated in the Calendar to be sixty-two, but himself claiming to be eighty and a Crimean veteran, was found guilty of the murder of Charles Thomas. Another indictment for the murder of Mary Thomas was not proceeded with. Charles and Mary Thomas, husband and wife, aged eighty-two and seventy-two, a thrifty couple with money saved, who had been servants for many years and latterly pensioners of Lord Tredegar, and were much respected by their neighbours, were in the evening of Friday, the 12th of November last, found murdered—their heads battered in with some blunt instrument—lying on their beds at their home, Tank Cottage, Bassaleg, a village two or three miles from Newport and between that place and Cardiff. It would appear that they had been killed in their sleep during the preceding night. Appellant, a man of somewhat strange habits, often spending much of the night and the early morning out of doors for the benefit, as he used to say, of his health, gaining a precarious livelihood by odd jobs, often in

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arrears for his board and lodgings, calling himself poor and then from time to time suddenly appearing in possession of funds which he ascribed to the bounty of a rich sister living, as he alleged, at Cardiff, knew the murdered couple and was friendly with them, he had been inside their house and knew that they had means. For more than a year, until some three months before the murders, he lived with Mr. and Mrs. West, a few yards from Tank Cottage; he had wished to marry, on last August Bank Holiday, the Wests' daughter Florence, aged fifteen. Neither she nor her parents would hear of such a thing; the refusal embittered him; he used threats, and, in the middle of August, had to leave. Later he went, in September, to live with a Mr. and Mrs. Doody at Pye Corner, half a mile away. He continued to molest Florence West with threats; two summonses for so doing were for hearing before the justices at Newport on Saturday, the 13th of November. About a few days before that date, he said to Mrs. West that she and family would rue it and would be shedding tears. On the Thursday he was, to all appearances and according to his own statements, penniless; he tried to borrow small sums of money to enable him, as he said, to go to Cardiff on the morrow to see his sister and to consult a solicitor. To his landlady he said that he would go to bed early, as he wished to go into Cardiff early; and he appeared to go to bed, but there was evidence that he was out at a neighbour's at a later hour. The theory of the prosecution was that he was out of doors during that night, and did not sleep in his bed. He had certainly gone out before anybody else was stirring. He was undoubtedly at Newport and at Cardiff at early hours on the Friday, and, breakfasting at a restaurant at Newport, had such an air of poverty about him that he was charged by the waitress one penny only, instead of threepence, for his breakfast. Later he was spending money freely; he paid two guineas at the office of a leading solicitor to have himself defended on the following day at the hearing of the summons; he returned to the restaurant at Newport, had a good meal, and gave the waitress who had taken pity on him in the morning a "tip" of one shilling; he gave conduct-money to witnesses whom he wished to call the next day; and in other ways was lavish. In all he was shewn to have had between 4*l.* and 5*l.*, and there were five florins among the coins of which this sum consisted. The murdered people had in a chest upstairs a

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hoard of money, about 154*l.* in all; but the chest had escaped the murderer's notice. What other moneys they may have had is uncertain, but the person who is known to have last seen them alive paid them in their home on the afternoon before their deaths a sum of 3*l.* 1*s.* 4*d.*, and the sum included five florins. There were no florins in the chest. The lower rooms had been rummaged and ransacked, and a satchel, worn by the dead woman round her waist, in which she kept money, had been dragged from her body, and was found empty of money with bloodstains upon it. On the Saturday appellant attended before the justices, and although aware that he was suspected of the murder, he gave evidence with much self-possession; he was bound over, and having only one surety instead of the two required, was detained, and on the Sunday charged with the murder. He protested his innocence, and continued to do so. A main feature of the case for the prosecution consisted in the suggestion that appellant had sought to throw suspicion of the murder from himself upon the Wests; the suggestion rested upon two circumstances: the key of the murdered people's house was found on a window sill at the Wests'; a jacket once worn by the girl Florence, long since discarded, and having been lost sight of for months, was found outside Tank Cottage under the window through which the murderer had entered, and was thought to have been used to break the glass of the window. It was said that nobody but the prisoner had ill-feeling against the Wests. As regards the prisoner's possession of money, his story of the rich sister was disproved—the lady whom he named had never heard of him—no satisfactory or even plausible account was forthcoming. There was scientific evidence: Mr. George Rudd Thompson, the county analyst, detected a number of small spots of blood on the sleeve of a coat belonging to the prisoner, and believed them to have the degree of freshness and other characteristics which they would have supposing them to have come from the victims. The prisoner did not give evidence at the trial, and called no witnesses. Appellant asks that Mrs. West and Police-Constable Bale should be recalled for further cross-examination, both of them for the purpose of discrediting Mrs. West's evidence about matters lying rather far away from the heart of the case; the prisoner wished to show that she was inaccurate in some matters not very material, that she had ill-will to him, and that other people bore her

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ill-will. Whether or not the Court could let witnesses be re-called for such a purpose, the cross-examination had been conducted according to his (counsel's) discretion.

[Lawrance J. We think that the discretion was wisely exercised.]

In the course and conduct of the trial certain incidents prejudiced appellant's defence, and there are in the summing up certain mis-statements of evidence; also there was misdirection and non-direction. First, appellant's case was at a disadvantage owing to the way in which one incident was treated by the counsel for the prosecution and in the summing up. Appellant was questioned by the police about marks, which looked like blood, on his cap, guernsey and shirt sleeve. His answer was that "The marks on the cap and guernsey are red paint, and the mark on the shirt is from a cut on my thumb." He was asked whence the paint came. He answered: "I got it in my work, and if it is not paint, the Wests killed a pig before this, and I may have got it then." He proved to be right as to the paint, and as to the shirt sleeve, the analyst said that it was too old to have anything to do with the case. Nothing, therefore, that was the subject of that conversation had any inculpatory value; the incident was favourable to the prisoner. All those matters passed out of the case, and with them went the suggestion of pig's blood—a suggestion made in reference to them only, and not put forward by the prisoner himself, or at the trial by counsel, in reference to any other stains of which evidence was given. For those other stains other and reasonable explanations were offered. The theory of pig's blood was never part of the case. Yet after the cross-examination of the analyst, in which no such theory was even hinted at, counsel for the prosecution, in re-examination, put it to the witness whether those other stains, which had never been suggested to be from pig's blood, could be from pig's blood; he emphatically denied that it could. Pig's blood is distinguishable from human blood; and though he (counsel) at once protested that the suggestion was not, and never had been, part of the case for the defence, the subject was pursued; and in the summing up Grantham J. speaks as if the theory of pig's blood had been seriously put forward to account for the stains which were part of

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the subject-matter of the case and had been refuted. Having regard to the course and conduct of the trial, he (counsel) must say that the incident gave to the prosecution an unjust victory in the forensic controversy, and the defence was made to appear beaten by means of the refutation of a false theory. The real theory was thus obscured, and the case of the defence ignored. As to the summing up, there were two main heads of the case for the prosecution. The first consisted of the fact that appellant seemed to be, and stated himself to be, penniless on the eve of the murder, and that next day he was in funds; a condition of things which Best had classified as "sudden change of life or circumstances." (Best on Evidence, ed. 1844, pp. 40, 41, 315, 316.) The significance of such evidence is said to be that the charge is not easily explicable except on the hypothesis of the possession of the fruits of crime. The learned judge, at the opening of his summing up and elsewhere in the course of it, said much about violent and other presumptions, and especially of the presumption to be drawn from the possession of undoubtedly stolen and identified property: here he had to deal with unidentifiable coins; and he spoke incidentally of the possession of "about the amount of money stolen": in the case, there was no proof that any particular amount was stolen; the prosecution suggested that £3 1*s.* 4*d.* was missing; there was some evidence that five florins were in the possession of the deceased on the day before, and that no florins were found after the murder. The prisoner was shewn to have had after the murder between £4 and £5; he was shewn to have among other coins five florins in the course of that day; florins were common enough, and he could quite well have received them in change. It could not be rightly suggested that the presumption drawn from the recent possession of identified stolen property applied in all its force to such a state of circumstances; the judge's language may have led the jury so to apply it; he ought to have warned them against that error (counsel cited Starkie, Evidence (3rd ed.), vol. 1, p. 569; cited in Best, above, p. 316). The next main head of the prosecution was the suggestion that the appellant must be the murderer because nobody but the murderer could have put the key on the Wests' window-sill and have left the girl's jacket outside the door of Tank Cottage, and that both incidents were part of a design to throw suspicion upon the Wests and that the appellant alone had any ill will against the Wests

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and must therefore be the murderer. This theory might be said to be of the staple, quite half the staple of the prosecution's case. Proof of such conduct as was attributed to the appellant would, needless to say, be of immense force; the significance to be attached to it was closely analogous to attempts to make a false case, to defend oneself by subornation of perjury, to destroy true evidences and to fabricate others—all such conduct brought home to a litigant or an accused might forcibly strengthen against either of them a case of which the direct proof was not adequate; the value of such evidence might be illustrated by *Watt* (1905), 70 J. P. 29; 20 Cox C. C. 852, where Phillimore J., having ruled that proofs of attempts to suborn evidence for an accused were admissible as proof of guilt, discussed its significance. Here the suggested acts were contemporaneous with the crime—in fact, part of the *res gestae;* they must be brought home to the accused by strong evidence before inference of guilt could be founded on them; here a main case of mere suspicion was sought to be made conclusive by a subsidiary case of mere suspicion; a suspicion was supported by a suspicion; appellant was suspected of the murder because he was suspected of the disposal of these two articles; and he was suspected of disposing of the articles because he was suspected of the murder. The judge ought to have touched upon this head of the case and directed the jury that they ought not to speculate upon a matter of this sort, and that they ought not to act upon the suggestion of the prosecution unless the attempt to shift suspicion was brought home in a clear and unmistakable way. There was no such proof; the jacket, for instance, was not known to have been seen by the prisoner, much less to have been in his possession. In spite of the prominence given to this part of the case, the judge totally ignored it, and the jury may have, in the absence of proper warnings, accepted the theory of the prosecution as proved. Nearly the whole of the evidence of his relations with the Wests was dependent on this theory and without the theory was quite inadmissible on the ground of irrelevancy, and, moreover, as prejudicial to appellant's character.

[Phillimore J.: Did not the evidence shew his need of money to get advice and witnesses owing to proceedings pending against him at the instance of the Wests?]

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That may be, but then there was all the more reason why the judge should have noticed this part of the case, and not passed it over in silence.

The next ground of complaint is that the judge gravely prejudiced appellant's case by the use of matters which came out incidentally in the evidence, and which were quite consistent with innocence of this and other crimes; this was the evidence about the prisoner's habits of early rising and the like. The judge said: "We have no explanation why his health was benefited by getting up at two or three in the morning," although there was no onus on the prisoner to explain such conduct; and the learned judge went on to suggest that this habit was accounted for by the suggestion that appellant was living a life of crime. This suggestion was quite gratuitous, and must have affected the jury and damaged the prisoner by representing him as a criminal. It was contrary to the spirit of the rule which excludes the mention of previous convictions until after verdict. Another complaint is that the learned judge represented the prisoner as having attempted to bribe witnesses to give evidence at the hearing of the summonses. There was nothing in the evidence to justify the allegation of bribery: he asked the witnesses to give evidence, and offered them conduct-money. He did nothing to suggest that he wished them to give false evidence, and in one instance it was proved that he was right as to the fact he wished to prove, though the evidence might have been irrelevant or inadmissible.

Running through the summing up there was the same suggestion that it was for appellant to explain things not material to prove guilt, not of themselves wrong, and admitted by the prisoner. Such language tended to lead the jury to think that the onus of proof was shifted. Why, for instance, should he be asked to explain his visit to Cardiff, which was for a definite object avowed by himself beforehand? Then he had put right and oiled at Doody's house (when Doody was ill) a bolt which admittedly needed to be eased—a natural act, yet he is asked to explain the incident. The vice of such language is that it tends to lead the jury to apply to any and every circumstance in the case the doctrine of the need and duty of explanation—a duty having very narrow limits, which ought not to be extended.

[Lawrance J.: Do not all these matters, though each is little

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in itself, tend to some result? Have they not, taken together, a value?]

Yes; I do not contest their relevancy or that they may have a cumulative value. I object to the way in which they are treated; they are taken in the gross, and there is a wholesale application to them of the doctrine of the duty of explanation.

[PHILLIMORE J.: May appellant not be asked to explain the coincidence? He does not explain the oiling of the bolt and other incidents. He does not explain the peculiar coincidence of several things.]

I contend that he should not be called upon to explain matters consistent with innocence; still less should he be asked to explain the coincidence of several such incidents. It is a misuse of the doctrine of explanation. He did not himself give evidence. Who would call a prisoner to explain matters which he did not dispute, and which did not incriminate him?

[PHILLIMORE J.: He could surely explain why he was not in bed all that night?]

He did not admit the fact, and there was no clear proof of it; and he cannot be expected to explain that which he denies. As to the analyst's evidence, the learned judge, having set out upon his summing up with language about presumptions, violent and other, and having familiarised the jury with such ideas by frequent allusion, said: "If you believe the analyst who gave his evidence here it amounts to almost what the law calls a violent presumption, which being unexplained, must lead you very very far to the conclusion, however sad it may be, that this man is guilty." He then deals with the stains on the coat sleeves, and overstating the effect of the analyst's evidence, almost assumes it as proved that the blood found in the bedroom is proved to be some of the same blood which caused the stains on the coat. The jury might well think that the absolute identity of blood could be proved like that of individuals. The analyst had said that in his opinion the stains, like the blood in the room, had the characteristics of human

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blood, and that he believed them to be almost of the same age: he admitted, however, that the age of blood marks is hard to determine, and that comparison is difficult when (as in this case) the things compared have been under different conditions, and are in or upon different material; after all, it was matter of opinion only. The learned judge assumes an all but absolute identification, and proceeds: "It is for you to say whether or not that is a violent presumption against this man. You have the probable presumptions I have referred to. You have the violent presumption with regard to the coat if you believe what the witness said with regard to all those spots upon it." There was no justification for this selection of this piece of evidence, and its elevation into a violent presumption. Such language amounts to a misdirection. The learned judge should rather have cautioned the jury in the spirit of the words of Cockburn C. J. in *Nation* (1857):—". . . admitting the great advantages of science they were coming to great niceties indeed when they speculated upon things almost beyond perception, and he would advise the jury not to convict upon this scientific speculation alone." (Taylor's Medical Jurisprudence, 5th ed., vol. i., p. 491.)

[PHILLIMORE J.: Did you point out to the learned judge that he had omitted to direct the jury upon one part of the case?]

Counsel at the end of a long trial, and at a late hour, can hardly be expected to be ready with criticism which might involve the judge's whole view of the case. Often such matters are not realised at the time.

[PHILLIMORE J.: That may be; but misstatements of detail can be corrected by counsel at the time.]

Cranstoun and *St. J. G. Micklethwaite*, for the Crown, were not called upon.

LAWRANCE J: The appeal must be dismissed. The Court fails to find any misdirection or want of direction such as has been complained of in the argument just addressed to them. It would be very difficult for any judge, however eminent, to sum up so

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long and complicated a case without affording matter in these respects for some such minute criticism. A judge could not deal with every point raised in a trial; but, looking at the case broadly, and having carefully studied the summing up, the Court thinks that Mr. Justice Grantham dealt fully with every part of the case, with the one possible exception of the small matter of the finding of the key; a matter which in our view had little bearing upon the question of the appellant's guilt. The learned judge may have considered it unimportant, and certainly he seemed to have dealt fully and carefully with everything else. The jury had been warned of the difficulties of the case, and of the duty of exercising care in arriving at a verdict. The jury had arrived at a conclusion at which it was open to them rightly to arrive; and there was nothing in the summing up in the nature of misdirection or likely to lead them to a wrong determination. The conviction was right.

Appeal dismissed.

Agnes Carroll.

AGNES CARROLL.

When the defence of insanity has been successfully set up at the trial, this Court will not entertain an appeal on the ground that the true defence was innocence of the offence charged.

This was an application for leave to appeal against conviction. The applicant was indicted for the murder of her husband, at the Durham Assizes on February 24th, 1910, before Ridley J.; the defence set up on her behalf was insanity; the jury returned a verdict of guilty, but insane; and the applicant was sentenced to be detained during His Majesty's pleasure.

Kenneth Marshall for the applicant (under s. 10 of the Criminal Appeal Act), who was not present. The applicant was found guilty but insane by the jury, and the ground of her application is that she did not commit the crime with which she was charged. She has always denied the commission of the act; and she says that her counsel at the trial, who relied solely on a plea of insanity, and thus virtually admitted the offence with which she was charged, had no authority to conduct her defence in that way.

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[PHILLIMORE J.: The Court has received a report from Ridley J., who tried the case, and he thinks the verdict was favourable for the applicant.]

But applicant considers that she did not have a fair trial, as the defence which she wished to rely upon—that she did not commit the act—was not presented to the jury.

[PHILLIMORE J.: It is against the practice of this Court to allow an appeal to be made on lines different from those followed in the Court below.]

In this case there is the circumstance that the verdict was taken upon an issue which did not cover the real defence, which should have been that the applicant did not do the act.

[PHILLIMORE J.: There was ample evidence on which the jury might have found her guilty of murder.]

Yes, but the defence was such that the statements of the witnesses for the prosecution from which her guilt might be inferred were not denied, the nature of the defence being such as not to require that they should be controverted. Applicant should now be granted an opportunity of placing the full facts of her case before this Court.

PHILLIMORE J.: Counsel has said everything that it was possible to say for his client. I think, however, that it would be fatal to the administration of criminal justice if this kind of appeal were to be allowed. There was a violent presumption that this woman had murdered her husband, the circumstantial evidence given at the trial making it probable that she was guilty in the sense that she had done the deed. Counsel who defended her at the trial—not the gentleman who appears for her to-day—on the ground of insanity, did not contradict the evidence that she had done the deed, and he got the verdict which he sought.

The course followed by the learned counsel in this case is a course which has often been adopted by advocates, like the late Mr. Montague Williams, of great experience in the defence of criminals, and in circumstances such as those in the present case it

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cannot be doubted that such a course is favourable to the person accused. Mr. Justice Ridley, who tried the case, states in his report to this Court that he thinks she is a lucky woman, and doubts whether the jury ought to have found her insane, although he does not say that there was no evidence to justify the conclusion to which the jury came. There is no doubt that the applicant made statements to the police which, if true, are inconsistent with her guilt; but, at the trial, she left the case in the hands of her counsel and she did not give evidence. She is a woman of some capacity and education. Now she says she was not guilty at all. The Court cannot interfere.

Application dismissed.

Anthony Stennett.

ANTHONY STENNETT.

Severity of sentence—Sentence will not necessarily be mitigated because the offence was committed under the constant influence of drink.

This was an appeal from an order of Bucknill J. refusing leave to appeal against conviction and sentence, and an application for leave to call further evidence. The appellant was convicted at Nottingham City Sessions on Feb. 11th, 1910, for neglecting his two little children, aged eight and four years, respectively, and sentenced to twelve months' imprisonment with hard labour

D. Carr for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The evidence against appellant was that he was constantly drunk, but earned regular wages. It appears, however, that he was sometimes in work and sometimes out of work.

[PHILLIMORE J.: There was evidence that he used to eat beef-steak and drink Guinness's stout when his children had nothing. He let his children be chargeable to the Education Committee, from whom they got free breakfasts and other food.]

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Anthony Stennett.

As to the application for leave to call further evidence, applicant wants to call his wife who was indicted with him, but who was found not guilty, and he also wants to call his son.

[PHILLIMORE J.: The Court can see no reason for calling these witnesses.]

As to the sentence, if the appellant had been tried summarily, the sentence could not have been more than six months' imprisonment. It was a proper case to be tried by the justices; but, at his own request, instead of trying him themselves, they sent him to be tried by a jury at the Sessions.

[PHILLIMORE J.: The children were in fact well-fed, but that does not meet the statute.]

As it was really a case of neglect owing to drunkenness, a shorter sentence would have met the justice of the case.

PHILLIMORE J.: The jury, having considered the evidence, acquitted the woman, and found the man guilty. Is it a severe sentence? It must be remembered that the appellant shewed gross selfishness, feeding himself and neglecting the children. It is true the children did not suffer, owing to the charity of neighbours and to public charity. This is not a case of active cruelty; he did not beat the children; his neglect of them was owing to his drunkenness, and I think it would have been better if he had been tried for being a habitual drunkard. In the circumstances we think the sentence warranted; and it is in the interest of the man himself, as it gives him an opportunity to get rid of the habit of drinking to excess.

Application dismissed.

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William Garnham.

WILLIAM GARNHAM.

The Court does not usually grant bail, pending appeal, when the term of imprisonment is long

Appeal from an order of Phillimore J. refusing leave to appeal against conviction, and bail, and application for leave to call further evidence.

The appellant was convicted of larceny at the London County Sessions on February 1st, 1910, and sentenced by the Deputy-Chairman to twelve months' imprisonment with hard labour.

Salkeld Green for appellant (under sect. 10 of the Criminal Act), who was not present, having stated the facts, asked leave to call one witness, a van boy.

[Bray J.: The officers of the Court will try to get the van boy, and leave is given to call him. It is not usual to grant bail when the term of imprisonment is a long one, and in this case it must be refused.]

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Salkeld Green for the appellant (under sect. 10 of the Criminal Appeal Act), who was present. Briefly the facts are these: A boy was wheeling a barrow along Oxford Street, and when opposite to number 104 a man asked him to take a message up the stairs of number 104. When he returned, after delivering the message, the barrow was gone. At the trial a witness stated that he saw appellant wheeling the barrow; but all it came to was, that in the witness's opinion the man was appellant. A van boy, named Berty Goodship, who helped the thief to replace things in the barrow, after it had been overturned, was not called at the trial.

Berty Goodship was then examined by *Green*. (No proof of his evidence had been supplied to appellant or his counsel.)

Cross-examined by *Hurrell*, for the Crown, he swore that he had no doubt the appellant was the man whom he helped on the 10th January to replace the things on the barrow.

Salkeld Green: In the summing up nothing was said in favour

of appellant, but everything was stated as a fact against him. The facts were not fairly left to the jury. Appellant was undefended.

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PHILLIMORE J.: In this case there was reason to think that all the evidence which might have been called at the trial was not exhausted. The full Court therefore, on the application of appellant, gave leave to call the van boy. The boy's evidence, which has been given before us to-day, makes it clear that appellant is the man who stole the barrow. The appeal against the conviction must be dismissed. The sentence of twelve months will run from the date when leave to appeal was given.

Appeal dismissed.

LUCY JANE GREIG.

Lucy Jane Greig.

Not all pending charges should be taken into account in passing sentence for a less serious offence; when the pending charge is much more serious it should be tried separately.

Severity of sentence.

This was an appeal against sentence, leave to appeal having been granted by Bucknill J. The appellant was convicted of uttering a forged cheque, at the Hants Assizes on February 5th, 1910, and sentenced by Lawrance J. to eighteen months' imprisonment with hard labour. The offence for which the sentence was imposed had been committed on September 1st, 1909, but the appellant, with her mother, absconded, and they were not heard of until they were committed by the justices at Ryde on November 1st, 1909, to the Hants Assizes on a charge of obtaining money by false pretences. At the trial on November 9th, the mother was acquitted, but the appellant was convicted and sentenced by Mr. Commissioner Foote to four months' imprisonment with hard labour. While serving that sentence she was tried on the indictment for uttering. The ground of this appeal was that the charge of forgery should have been dealt with or taken into account on November 9th, when she was tried for the obtaining by false pretences. The appellant was not present and was not represented.

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Lucy Jane Greig

Temple Cooke, for the respondents, stated the facts. There was not time for the police to obtain a Home Office order to have appellant brought up before the justices in order that she might be committed to the same Assize on the charge of forgery The police did not mention it at the first trial because they considered the forgery charge too serious an offence to be dealt with without trial and merely on mention for sentence in another case. Moreover, the mother, who was acquitted on the first charge, had to be tried on the second, and the police thought that appellant should be tried with her.

PHILLIMORE J: No other course could have been taken in this case except that which was taken. If there had been time she might have been committed on the charge of forgery to the Assizes on November 9th, but there was not time. We have considered the matter, and we do not think the sentence excessive. The sentence will stand, and it will date from the conviction.

Appeal dismissed.

Solicitor for the Respondents—*The Town Clerk of Southampton.*

George Baker.

GEORGE BAKER.

On a charge of obtaining by false pretences, the nature of the offence, as differing from mere dishonesty, ought to be explained to the jury.

This was an appeal against conviction by leave of Phillimore J., and an application for leave to appeal against sentence.

Appellant was convicted on the 3rd January, 1910, at Cheshire Quarter Sessions, of obtaining by false pretences and other fraud, and sentenced by the Chairman to five years' penal servitude.

R. Mortimer Montgomery for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Appellant was charged and convicted upon an indictment containing three counts: the first count charging him with obtaining billiard balls and snooker balls by false pretences; the second, with obtaining credit by the same

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false pretences; and the third, with obtaining credit by fraud other than false pretences. He was staying at the Royal Hotel, Crewe, in November last, and, according to the evidence, he appears to have represented to the billiard marker at the hotel that he was in the billiard line, and wanted to know whether anybody there wanted to buy snooker balls. Appellant had a similar conversation with the son of the proprietress of the hotel, who agreed to purchase a set of billiard balls and a set of snooker billiard balls. He wrote on a form of postcard, bearing a picture of the hotel and supplied for the use of guests, to Sowerby, Liverpool, ordering billiard balls and snooker billiard balls, which were supplied to him, Sowerby thinking he was the proprietor of the hotel. Before it was sent this postcard had had the name of the hotel proprietor and the telephone number of the hotel, which were printed close to the edge of the card along the top of the picture, very neatly pared off. The suggestion of the prosecution was, that if this had not been done, either the hotel proprietor's name would have prevented Baker from being supposed to be the proprietor, or the trick might have been found out by Sowerby ringing up the hotel. After making enquiries, Sowerby gave information to the police and appellant was arrested. It is submitted (1) that there was no evidence of false pretences; and (2) that if there was evidence of false pretences, the question of false pretences was really not left to the jury; and (3) as to fraud other than false pretences, there was no evidence of such fraud. The postcard was the only thing that could mislead Sowerby. There was no statement on it in the nature of a false pretence. But the postcard was the only representation made at all, and if anything in or in connection with the postcard was fraudulent, it was a false pretence, and it follows that there was no evidence on the third count of the indictment. Further, there was no evidence of an intention to defraud. The billiard table which appellant had purchased from another person for 25*l.* he sold for 36*l.*, and the difference between the two prices would have enabled him to pay Sowerby if the transaction had not failed through the intervention of the police. As to the summing up, counsel complained of the whole of it. The jury were told, "It is for you to say whether the transaction the prisoner was engaged in was honest or not. He comes to that hotel and enters into a correspondence with these people under the circumstances which you have heard,

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and he cuts off the name of the hotel proprietor and writes the letters as if he were—anybody would suppose—the proprietor." That is not leaving the facts to the jury. There is no explanation of what false pretences are; the jury are not even told that a false pretence must be of an existing fact.

[Hamilton J.: Were not the jury to consider whether there was a false pretence in sending the card with the name of the proprietor cut out?]

It is submitted that that was not put to the jury fairly. They had no proper direction in law, and the summing up assumed everything against the appellant.

Artemus Jones, for the Crown, was not called on.

Hamilton J.: The appellant was convicted for obtaining goods by false pretences. He sent a postcard with the telephone number and the name of the proprietor of the hotel cut off. The suggestion was that he intended, by mutilating the card, to create the impression that he was the proprietor of the Royal Hotel. If the jury came to the conclusion that that was what he intended, and that Sowerby was misled into believing that he was the proprietor, there was evidence on which they might convict. The summing up, it is said, is open to criticism; but we must remember that it was addressed to twelve men who had listened with care to all the facts of the case. The Chairman ought, perhaps, to have stated the law, analysed the facts, and directed the jury more fully; and his question, "was it an honest transaction?" might have misled if it stood by itself. The proviso to sect. 4 (1) of the Criminal Appeal Act states that the Court may, notwithstanding that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has occurred. In this case we do not think that there has been a miscarriage of justice.

Appeal dismissed.

ARTHUR FLETCHER DEAN.

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Arthur Fletcher Dean.

Severity of sentence.
Sentence reduced on the ground of youth.

Appeal from an order of Phillimore J. refusing an extension of time, and an application for leave to appeal against sentence. On 25th February the Court ordered the application to be adjourned in order that enquiries might be made as to some statements appellant said he had made. The appellant had pleaded guilty at Cheshire Quarter Sessions, on January 3rd, 1910, to housebreaking, and was sentenced to five years' penal servitude. Court on March 4th granted the applications.

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E. A. Ebblewhite for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The appellant is a youth of twenty years, and was trying to find work, and in needy circumstances, when he committed the offences to which he pleaded guilty. He gave all the information he could to help the police to get back the property he had taken. There were several previous convictions proved against him. They began in 1899—he was then ten years old—when he was bound over for stealing a watch. In the same year he was sent, under the Education Act, to an Industrial School to be detained there until the age of sixteen, and in 1905 he was sentenced to fourteen days for frequenting; and in 1906 he was tried by court-martial for stealing a comrade's goods, and sentenced to fifty-six days, and to be discharged from the army with ignominy. In 1908 he was sentenced for stealing a cash-box and some money to eighteen months' imprisonment under the Borstal system, but he was so intractable that only a part of that sentence was served under the Borstal system. That was the last sentence before the sentence against which he now appeals. As a result of enquiries the Registrar of this Court has obtained letters from a farmer with whom appellant worked, from a court missionary, and from a builder, the latter of whom states, "I had no fault to find with him in any way." Having regard to appellant's age and the other circumstances of the case, I submit that the sentence of five years was too heavy.

E. Owen Roberts for the Crown. Appellant was tried by the

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Chairman who had tried him twice before as Recorder at the Chester City Sessions, and took all the circumstances into consideration.

LAWRANCE J.: In this case we think the sentence may fairly be reduced, having regard to appellant's age. His career has been as bad as it could be, and his conduct at Borstal was so bad that he had to be sent back to prison. Nevertheless, we think the sentence should be reduced to three years' penal servitude.

Sentence reduced.

George Alfred Seagrave.

GEORGE ALFRED SEAGRAVE.

The offence of obtaining by false pretences may be committed through an agent, the principal remaining passive.
Severity of sentence.

This was an appeal against conviction by leave of Bucknill J., and an application for leave to appeal against sentence. Appellant was convicted with a man named Roberts at Chelmsford Sessions on February 16th, 1910, of obtaining money by false pretences, and was sentenced to twelve months' imprisonment with hard labour.

A. Thesiger for the appellant (under sect. 10 of the Criminal Appeal Act), who was present. Appellant was in December last employed as a zinc-worker by a builder named Brown upon two houses which Brown was building at Clacton-on-Sea. A builder's merchant named Reed used to supply some materials for the houses, and appellant was on several occasions sent by Brown to the builder's merchant for the purpose of purchasing goods, and for other purposes. On December 21st Reed gave appellant a written quotation for goods to be supplied to him. Appellant was charged with obtaining on December 24th two hundredweight of white-lead from Reed by false pretences, the false pretences alleged being that appellant and the other man had been sent by Brown to obtain the white-lead, and that they were authorised to obtain the lead for Brown and to pledge his credit for it. Appellant gave evidence at the trial, denying the false pretence, and stating

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that he, with Roberts, drove up in a cart to Reed's and asked for the two hundredweight of white-lead for himself, which was supplied, and that Roberts signed the delivery note as appellant felt very cold and had his glove on. It was not suggested that he actively purported to be buying on Brown's behalf, and therefore, in view of his previous visit on his own behalf, it could not necessarily be presumed that he was acting for Brown. It is submitted, therefore, that there was no evidence of a false pretence by words or by conduct.

[PHILLIMORE J.: On December 24th he went and got the goods because it was believed he was getting them for Brown. Whenever he asked for any goods they were supplied to him for Brown, the appellant signing a delivery note before the goods were delivered to him.]

But there was no evidence that on this occasion the appellant saw what was in the delivery note, or that he knew that it was made out to Brown and not to himself, and it was Roberts who signed it.

[PHILLIMORE J.: At the close of the case for the prosecution, was there a submission that there was no evidence of false pretences?]

There was not. Prisoners were undefended.

[PHILLIMORE J.: In that case, it has been decided by this Court more than once that it will look at the whole of the evidence. In cross-examination the appellant said that if he had been nearest the man making out the ticket he would have signed in the ordinary way, and if the note had been made out in the name of Brown he would have noticed it and said: "Here, you have made a mistake." But the other man, Roberts, in cross-examination said that when asked by the appellant to sign the note, he asked: "Who shall I sign it for?" and that the appellant replied: "It does not matter what you sign, they all know me."]

As to the sentence, appellant had been convicted in 1904 under

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the Prevention of Crimes Act, 1871; and a charge of obtaining 5*l.* by false pretences in May last was taken into account in passing upon him the sentence of twelve months for this offence. Having regard to the fact that a period of five years had elapsed since his previous conviction, it is submitted that the sentence should be reduced.

PHILLIMORE J.: It is well established that a false pretence can be made by conduct. Ordinarily it consists of a false statement made as to some existing fact; the statement must be made with the intention of obtaining money, property, or valuable security; the thing must be of some value, and the person must have parted with the property, relying on the false pretence. The question in this case was, did the appellant make a false representation that he was there for Brown when he asked for the goods? Brown in his evidence said that the appellant had no authority from him to order the lead; and the persons who supplied it said they thought they were supplying it to the order of Brown. It is said that the appellant might have intended to deal for himself, and attention has been called to the fact that on the 21st December he went to the prosecutor's place of business and asked for a quotation for some material for himself; but on that occasion he was informed in writing that one of the terms was "cash on delivery." The appellant and the other prisoner gave evidence, and the latter in effect said that he was merely the catspaw of the appellant. The delivery note which was made out to Brown was signed by Roberts by the appellant's direction. It may be that the appellant never saw the name on the delivery note. He may purposely not have looked at it. It appears from the evidence that Roberts was only the tool of the appellant. The conviction must be affirmed. Other matters were taken into consideration in passing the sentence, and we do not propose to reduce it. The sentence will run from the date when leave to appeal was given.

Appeal dismissed.

WILLIAM PRATLEY (a).

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William Pratley.

Misstatements in a summing up will be considered in connection with the question whether there has been a miscarriage of justice.
Severity of sentence.

H. Gundry for the appellant (under s. 10 of the Criminal Appeal Act), who was present. In summing up the learned Chairman misdirected the jury. He told them: "The truth is, he (appellant) sold it himself, and if you believe that, it is your duty to find him guilty." That was a direction to the jury to find that appellant sold the trap which he had hired on the 1st December, 1909, to take him to Greenwich. There was no evidence that appellant had sold the trap. His statement at the trial was: "All I wish to say is, that I went into a public-house to have a drink, and when I came out I missed the trap and all my goods. I hired the trap off Robbins, and I did not like to go back and say I had lost it, but with regard to the trap itself I never sold it—the man who was in the trap sold it." Though appellant never denied his liability, a large part of the summing up was devoted to his identification—a course which must have prejudiced him in the eyes of the jury. The trap was sold at Southall market by auction a few hours after it had been hired. I propose to call the auctioneer, having on the 25th February obtained the leave of the Court to call him.

J. F. Steel examined by *Gundry* said that he was an auctioneer, and sold the trap on December 1st at Southall. On being asked to look at appellant, he said he failed to recognise him as the man who brought the gig to be sold.

L. S. Green for the Crown. No grounds have been made out for interfering with the conviction or sentence. There have been two complaints with regard to the summing up. It has been said that appellant was prejudiced by the references in the summing up as to his identity. Those references, however, could not have prejudiced him; and they were material by reason of the fact that appellant had stated to the police-officer who arrested him on the charge of stealing the trap, "You have made a mistake." These

(a) See p. 111, above.

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words would put in issue his identity, or any other defence he might be advised to raise. Moreover, when before the magistrate, in reply to the statutory caution, he said nothing. It was necessary, therefore, for the prosecution to give some evidence of identity; and it was not until the case for the prosecution had been closed that appellant for the first time raised the defence that another man had sold the trap. As to the words "The truth is, he sold it himself," these words are governed by the words higher up in the transcript, "are these points sufficient to shew that this man intended permanently to deprive the owner of this trap and convert it to his own use?" It is a matter of punctuation only. Besides, whether appellant did or did not sell the trap himself was immaterial as regards the case of the prosecution. There was ample evidence for the jury to convict. He was a poor man, and he could have gone to Greenwich for a shilling instead of hiring a trap for the purpose. Hanwell was an afterthought, and he did not return to inform the owner of the gig of his loss. The other man, he said, was his "friend," but he has not disclosed his name or given a description of him.

[PHILLIMORE J. referred to *Stoddart's* case, 2 C. A. R. 217 (1909), on the question of proper direction.]

Here there was no question as to the burden of proof, as in *Stoddart's* case. It was a question for the jury. On the question whether there has been a miscarriage of justice, I am entitled to ask the Court to look at appellant's record

Gundry: I object to these matters being gone into. In this Court previous convictions should only be taken into account on the question of sentence, not, I submit, on the question whether a conviction is right or wrong.

[PHILLIMORE J.: When I was on the Committee for framing the Rules under the Criminal Appeal Act, we considered that we ought, from the very beginning of the appeal, to have these previous convictions brought before us. The weight of such materials is for us.]

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Gundry, in reply: The words, "the truth is, he sold it himself" are as unambiguous and definite as a statement can be.

[PHILLIMORE J.: It was left to the jury to say whether he sold it or not. There was no misstatement; it is a matter of punctuation. A shorthand writer is not infallible. He sometimes leaves out words.]

Appellant, even in a case of construction of words, should have the benefit of any doubt, and there is reason to apprehend that there has been a miscarriage of justice.

LAWRANCE J.: In carefully reading the summing up, especially the part complained of, it becomes clear that the learned Chairman made two statements—one with regard to the case for the prosecution, and the other with regard to the case for the defence. I do not believe that the youngest and most inexperienced Chairman would make such a misstatement in summing up as to say without qualification, "The truth is, he sold it himself." Having regard to the context, the difficulty appears to be a mattter of punctuation, and I do not think there was a misdirection. The last conviction was on the 5th February, 1907. We cannot reduce the sentence, but it will run from the time leave to appeal was given.

Appeal dismissed.

GEORGE HENRY RICHARDS.

25 *February.*
George Henry Richards.

Conviction quashed on the ground that the defence was not properly put to the jury.

Appeal from an order of Phillimore J. refusing leave to appeal against conviction, and application for leave to call further evidence.

The appellant was convicted at the Middlesex Sessions, on February 8th, 1910, of larceny of a cart, and sentenced to seven years' penal servitude.

H. Lawless for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Prisoner stated that he bought the cart. I also ask for leave to appeal against the sentence.

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[Bray J.: Have you the leave of the prisoner to appeal against the sentence?]

Yes.

Bray J.: In this case we give leave to appeal, and also leave to call Thomas Church, who was called at the trial, but being too late did not answer to his name.

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H. Lawless for the appellant (under sect. 10 of the Criminal Appeal Act), who was present. The grounds on which the conviction ought to be quashed are that the learned Chairman, in summing up, misquoted material parts of the evidence, ignored the case set up by appellant in his cross-examination of witnesses and in his statement made in the dock, and assumed the truth of the evidence for the prosecution. According to the evidence, appellant went to the prosecutor's shop on the 6th October and had some negotiations with the prosecutor for the purchase of a cart. Prosecutor and appellant knew one another for some time and had had some business transactions, and on the occasion referred to appellant did not buy but he borrowed the prosecutor's cart. For some time afterwards he supplied to the prosecutor some goods of the value of 1*l.* to 2*l.* In cross-examination by appellant, prosecutor denied that he had offered to sell him the cart for 2*l.*, but admitted that he had paid appellant something on account of the sum owing for the goods supplied. There was also something said as to repairs of the cart to be done by appellant.

[Phillimore J.: The defendant says, in effect, I honestly thought you had sold me the cart; and the prosecutor says: I owe him a few shillings.]

Appellant afterwards sold the cart, saying to the purchaser that he had bought it, but that it did not suit him. Appellant, in his cross-examination of prosecutor and in his statement to the jury, asserted that he had purchased the cart from prosecutor. He also said that prosecutor could have had it back if he wanted it. In summing up, the Chairman said, "the prisoner owes him some money," whereas, in fact, he ought to have said that the prosecutor owes prisoner some money. The jury were also asked to say, "is

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this man guilty or not guilty of selling this man's cart, which was lent out of kindness?" Everything was assumed against appellant, and from the beginning to the end of the summing-up, appellant's defence was not put to the jury, and they were not asked to consider it.

Counsel offered to call the witness for whom leave was given, but the Court did not wish to hear him.

A. J. Lawrie for the Crown. There was considerable evidence that the cart was lent to appellant; and there was no evidence whatever that it had been sold to him or that a sale had been suggested except his own statement, which was not made on oath. It was, therefore, unnecessary for the chairman to leave that question to the jury. The evidence as to the dealing by appellant with the cart shews guilty knowledge. There was no miscarriage of justice. The proviso to sect. 4 (1) of the Act is applicable to this appeal.

PHILLIMORE J.: This conviction cannot stand. Upon this summing up it seems to us that there has been a miscarriage of justice. Two defences were set up by the appellant at the trial. One was that he challenged the title of the prosecutor to the ownership of the cart, saying that it was no longer the prosecutor's, but his own. The other defence was that he, the appellant, had not sold the cart, but that he had certain rights which entitled him to detain it. The fact that he had a cross-claim against the prosecutor, and that he thought he might sell the cart which he said he had bought, were properly raised, and were material as to whether he had a guilty knowledge. The question put by the juryman, towards the end of the summing up, had reference to the element of guilty knowledge, but the Chairman did not leave it to the jury in the proper way. Another objection to the summing up is that the learned Chairman did not deal with the defence raised by the appellant as to the method by which he became possessed of the cart. It is true that he did not go into the witness box; but he cross-examined the witnesses, and when he set up title to the chattel, that point should have been submitted to the jury under a proper direction. The Chairman told the jury that the claim of title was

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"inconsistent with the statement that he was only keeping the cart while it was being repaired." But it might have been left to the jury with a statement that it was improbable. The conviction must be quashed, and the appellant remanded and tried on other indictments remaining on the file.

Conviction quashed.

BEFORE

MR. JUSTICE LAWRANCE, MR. JUSTICE JELF, AND MR. JUSTICE BRAY.

EDWARD LUCY.

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Edward Lucy.

A question by the accused may be sufficient corroboration of an accomplice.

This was an appeal from an order of Bucknill J. refusing leave to appeal against conviction. The appellant was convicted at the Central Criminal Court on February 17, 1910, of shopbreaking, and sentenced by Mr. Commissioner Rentoul, K.C., to four years' penal servitude.

E. Fulton for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. The ground of this appeal is that there was no evidence to corroborate the statements made at the trial by an accomplice.

[BRAY J.: Do not the statements made by the appellant when arrested substantiate the evidence of the accomplice Hazel?]

Appellant suggests the names of four witnesses who would be able to prove an *alibi* the night the robbery was committed. There was no evidence of any description, except that of the accomplice, that appellant was anywhere near the shop when it was broken into. There was no corroboration; and the learned judge should have told the jury that the words—"do you think I should be such a fool as to have the stuff here for you to get it?"—alleged to have been spoken to the police when they came to arrest appellant, were not capable of being construed as an admission of guilt.

BRAY J.: Our judgment is that the point was left to the jury with absolute correctness. As to the evidence of corroboration, the

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learned judge put it thus: "This is one of those cases that require corroboration. It is on the statements of this man when arrested that the corroboration rests. . . . 'Do you think I should be such a fool as to have it here for you to get it?' Do you think that there is anything that amounts to an admission of guilt?" Every proper question was put to the jury, and the jury concluded that the statement made to the police was some evidence to corroborate Hazel, and were, therefore, fully justified in convicting the appellant.

Application dismissed.

John Henry Smith.

JOHN HENRY SMITH.

Severity of sentence.

This was an appeal from an order of Bucknill J. refusing an extension of time and leave to appeal against conviction and sentence. Appellant was convicted on January 12, 1910, at the Wilts Assizes of carnal knowledge of a girl under the age of thirteen, and sentenced by Lawrance J. to twelve years' penal servitude.

Thornton Lawes for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. In this case there were two indictments, (1) under the Punishment of Incest Act, 1908, and (2) for carnal knowledge. Appellant was tried and convicted on the latter charge, although the little girl was his own child, seven and a half years of age. The principal reason of the appeal is the severity of the sentence; and in this kind of case there is a good deal of variety in sentences. This was a first conviction, and there was no other evidence that appellant was not a good father.

Jelf J.: This was not an attempt. The jury were entitled to come to the conclusion that there had been a complete offence. It has been said that a sentence of twelve years was excessive, as there were no previous convictions against the man. He was not able to shew that the crime had been committed in a fit of drunkenness, or anything of that sort. We cannot say that a sentence of twelve years is too much. The appellant has not shown affirmatively any ground for the reduction of the sentence.

Application dismissed.

MIRIAM CHARLESWORTH AND MAY (otherwise VIOLET) CHARLESWORTH.

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On a charge of obtaining by false representations, evidence of other earlier false statements is admissible to negative a defence of belief that the later representations were true.

These were appeals by Miriam Charlesworth and May Charlesworth, her daughter, against conviction upon grounds of law, and applications for leave to appeal against convictions upon questions of fact, and applications for leave to appeal against sentence. Appellants were convicted at the Derby Assizes on the 23rd February, 1910, on charges of conspiracy and obtaining money by false pretences, and were each of them sentenced by Darling J. to three years' penal servitude.

J. Roskill, K.C. (with him *H. Maddocks*) for the appellant Miriam Charlesworth, who was not present. The indictment contained four counts, in two of which they were charged with conspiracy to obtain money by false pretences, and in the other two with obtaining money by false pretences. There was no separate indictment for obtaining money by false pretences against either of appellants. The grounds of the appeal are that there was no evidence of conspiracy or of false pretences, and the defence was prejudiced by the fact that the counts were joint and not separate. In passing sentence Darling J. said, "As I have said I have passed no sentence in regard to the conviction for conspiracy. The reason I did not do so I have given, and I wish counsel for the prosecution were here to convey to the Attorney-General and those who prosecute on behalf of the Crown, that it is very inexpedient to put into one indictment, as is constantly done now, especially in Treasury prosecutions, charges of conspiracy to commit a crime, followed in the same indictment by charges of the committing of the crime. It leads to the kind of embarrassment I have just mentioned; that is, that one cannot pass sentence for all the offences of which the prisoner has been convicted, and it may lead in some cases to difficulties, especially when conspiracy is joined with other counts for reasons which I need not state, because they are so obvious to every one practising in the criminal Courts." The evidence was

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that many of the false representations were made by the daughter in the absence of the mother. The jury should have been asked to distinguish between the daughter and the mother. What is the evidence of representations alleged to have been made by Miriam Charlesworth? In the year 1900 Dr. Barratt had attended an elder daughter of Mrs. Charlesworth. He said that on the occasion of one of his attendances Mrs. Charlesworth had told him that the elder daughter and Violet would be jointly entitled to a fortune of 75,000*l.* upon the elder daughter attaining the age of twenty-one. The elder daughter died not having attained twenty-one. Violet was then sixteen years of age. Two years later (1902) Violet told her mother that she had met a young man named Alexander McDonald who had promised to settle upon her a sum of 150,000*l.*, to be paid to her on her attaining twenty-five years of age. Mrs. Charlesworth told Mrs. Smith of her daughter's promised fortune, and Mrs. Smith, in the year 1903 and from time to time afterwards, advanced various sums to the mother and Violet upon the understanding that the money should be repaid when the fortune was received by Violet. Was the evidence of Dr. Barratt of the conversation with the mother in 1900 admissible upon the charge of obtaining money by false pretences from Mrs. Smith in 1903? There was an interval of three years, and surely the circumstance that Mrs. Charlesworth told a lie in 1900 could not have been relevant upon the charge of false pretences three years afterwards. Wherever evidence of previous acts has been admitted, such acts have been criminal acts, and evidence of previous criminal acts is admissible only to prove system. In proof of this, I rely upon *Bond*, (1906) 2 K. B. 389; 75 L. J. K. B. 693; 95 L. T. 296; 70 J. P. 424; 21 Cox C. C. 252; 22 T. L. R. 633; 54 W. R. 586; C. C. R. In all cases in which this sort of evidence has been admitted, the date at which such previous acts were committed must not be too remote. *Rhodes*, (1899) 1 Q. B. 77; 68 L. J. Q. B. 83; 79 L. T. 360; 47 W. R. 121; 62 J. P. 774; C. C. R. In the present case there was an interval of three years and five months. See *Wyatt*, (1904) 1 K. B. at 192; 73 L. J. K. B. 15; 52 W. R. 285; 68 J. P. 31; 20 Cox C. C. 462; 20 T. L. R. 68; C. C. R.; and *Francis*, L. R. 2 C. C. R. 128; 43 L. J. M. C. 97; 30 L. T. 503; 12 Cox C. C. 612 (1874).

[Bray J.: Mrs. Charlesworth, in her defence, said: "I believed

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what my daughter told me. She told me she had met a man named McDonald who promised her 155,000*l*." Was it not open to the prosecution to shew that she knew that was not true, because two years before she was saying her daughters were co-heiresses? No objection to the evidence was taken by counsel at the time.

JELF J.: It would be surprising if our law could not allow her representation to be contradicted.]

My point is Dr. Barratt's evidence was not admissible, because it was too remote and not connected with the act charged. Except for his evidence there was hardly any against the mother. The charges were joint, but nearly all the representations were made by the daughter.

[JELF J.: If there was a conspiracy the evidence of Dr. Barratt was admissible. There is no analogy between your case and those you cited.

If there was evidence of the conspiracy they were punished for the false pretences.

[JELF J.: Because the conspiracy was successful.]

The Court discouraged any appeal against sentence.

Friedman, for the appellant May Charlesworth (who was not present), thereupon abandoned the appeal.

Ryland Adkins, for the Crown, desired on behalf of the Director of Public Prosecutions to address the Court on the observations made by Darling J., on the inexpediency of joining in the same indictment counts for conspiracy and for false pretences, but the Court declined to go into that matter.

BRAY J.: In this case both appeals must be dismissed. We will deal with them separately, as the learned judge at the trial did. The main point put forward on behalf of Mrs. Charlesworth is that the evidence of Dr. Barratt was inadmissible. No objection was taken at the trial to the admission of this evidence; but we are not deciding the case on the ground that there was no submission against the reception of evidence, and there may have been good ground for not objecting to it at the time. To see whether

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the evidence was admissible we must look at the case set up below by Mr. Maddocks. That case, from the outset, was not that she did not make the representations, but that she made them believing them to be true. That, if established, would have been a good answer to the charge. It is clear from her examination-in-chief that that was the defence. She said that her daughter went to Scotland sometimes, and that sometimes she went to Lewes; and that, on one occasion, when the daughter returned home she told her that she met a young man named McDonald in the south of England and that he had promised her £155,000. Mrs. Charlesworth also said that she was satisfied her daughter was telling the truth, and that she had never told an untruth. That was the defence set up before the jury, and the jury would have to say whether it was true or not. But then there was the evidence of Dr. Barratt that in 1900, two years before the occasion when her daughter told her of the promise of £155,000, Mrs. Charlesworth had told him that when Violet should attain the age of twenty-one she and her sister were co-heiresses in a fortune. That evidence was inconsistent with and contradicted Mrs. Charlesworth's evidence, and was therefore admissible to negative the defence set up that the mother believed the representations when she made them. *Bond's* case has nothing to do with this. Dr. Barratt's evidence was left to the jury as inconsistent with her defence that she believed the representations.

The next point raised was that the two cases were not sufficiently differentiated; but clearly they were, and Mr. Justice Darling instructed the jury that in order to find the prisoners guilty of conspiracy they must be satisfied that they had been acting together in pursuance of some agreement between them. As to the charge of obtaining money by false pretences from Mrs. Smith and from Dr. Jones, there was evidence that Mrs. Charlesworth was the first to make the representations to Mrs. Smith, and that the representations were afterwards repeated by Mrs. Charlesworth and her daughter; and this was equally so as to the representations made to Dr. Jones. The jury were asked to consider whether they found both or either of the prisoners guilty upon the charge of obtaining money by false pretences. As to the sentences, the appeals against them have been wisely withdrawn.

Appeals dismissed.

Solicitor for the Appellants: *William Durnford.*

FREDERICK MOON AND EMILY MOON.

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Frederick Moon and Emily Moon.

In sect. 17 of 8 Edw. 7, c. 67, the word "seduction" is used in its ordinary popular sense.

These were appeals against conviction on a question of law.

Appellants, husband and wife, were convicted at the Kent Assizes on the 23rd February, 1910, of encouraging the seduction of their daughter, a girl under the age of sixteen, and sentenced by Channell J. to four months' and to six months' imprisonment with hard labour, respectively. The prisoners were indicted under sect. 17 of 8 Edw. 7. c. 67, the Children Act, 1908, which makes it a misdemeanour for any person who "causes or encourages the seduction or prostitution" of a girl under the age of sixteen, of whom he has "the custody, charge or care." Appellants were charged in the indictment for that they having the custody of Bessie Moon, a girl under sixteen, to wit, fifteen years of age :—

1. On the 10th September, 1909, at High Halden, unlawfully respectively did cause the seduction of the said Bessie Moon, against, &c.
2. On the day aforesaid, at the parish aforesaid, unlawfully respectively did encourage the seduction of the said Bessie Moon, against, &c.
3. On the 22nd October, 1909, at the parish aforesaid, unlawfully respectively did cause the seduction of the said Bessie Moon, against, &c.
4. On the day aforesaid, at the parish aforesaid, unlawfully respectively did encourage the seduction of the said Bessie Moon, against, &c.

Stuart Sankey for the appellants (under sect. 10 of the Criminal Appeal Act), who were not present. Appellants, who were undefended, were convicted of encouraging the seduction of their daughter on the two dates mentioned in the indictment, namely, the 10th September and the 22nd October, 1909, respectively, although the evidence called by the prosecution did not shew, except perhaps inferentially, any immoral intercourse on the dates named, although it did shew that a man named Burns had had immoral intercourse with the girl in May and June, 1909. The word "seduction" is used in the statute, but the statute gives no

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definition of it. The learned judge at the trial explained that "to encourage" meant something more than to permit, that it meant actively doing something. In order to shew that, in this case, there was, having regard to the dates set out in the indictment, no offence within the meaning of the statute, the first witness called on behalf of the prosecution was Alfred Burns. He said that he was a labourer, and that he had served a sentence of three months' imprisonment for having carnally known Bessie Moon; that he had had connection with her, the first time in May last, and the last time in June last, only twice altogether. He lived in a barn with the prisoners and their children, nine of them in all, in one place; they all used to sleep in a compartment of this barn about thirteen feet long by nine feet wide, but he denied that he ever had had connection with her except on the two occasions mentioned. He also said that the female prisoner spoke to him three days after he had had connection with the girl on the first occasion, telling him that he ought to have been ashamed of himself. After having been so spoken to he continued to live with the girl and the rest of the family until the end of October. The female appellant, giving evidence on her own behalf, stated that she knew nothing about the relations between Burns and her daughter until after the daughter had been three months pregnant; and in cross-examination she said that, after she found her daughter was pregnant, she still let her sleep with Burns, as she could not keep Burns away. There is no evidence whatever that the appellants "caused" the seduction of their daughter; and it cannot be said that they "encouraged" it.

[Jelf J.: Can it not be said that persons who have the care of young people and allow immorality encourage it?]

Even if so, these people were living in a barn not under the control of the appellants and under conditions which make ordinary rules hardly applicable to their case. Further, in the summing up, Mr. Justice Channell told the jury that the question for them to consider first of all was whether, there having been in fact connection between Burns and the girl, it was really going on all the time down to the dates mentioned in the indictment, or whether it happened twice only—in May and June, as stated by Burns. The learned judge also instructed the

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jury that the word "seduction" "is generally used, in popular language, as meaning the first leading away from the paths of virtue of a woman, but it does not necessarily have that meaning; and I propose to tell you, for the purpose of this case—and I do so because I know now that if I am wrong, and if the result is that the prisoners are convicted, there is a Court of Criminal Appeal, which can say authoritatively—what the meaning of this word is. I propose to tell you as my own view on the whole, although I think it is a matter of considerable doubt, that the word 'seduction' in this clause of the statute is not confined to the first connection of an unmarried woman, which is the sense one sometimes uses the word seduction—when it is done for the first time—but that it covers a case of continual connection, or fornication, one might call it; and the continual connection between unmarried persons would be covered by that." There was no evidence of connection except on the two dates mentioned by Burns.

[Jelf J.: Could not the jury infer from the evidence as to their continuing to live together that connection took place down to the time alleged in the indictment?]

The evidence called by the prosecution negatives any such inference.

[Bray J.: The point of the case is, whether the appellants can be said to have encouraged seduction within the meaning of the statute. If seduction there has its popular meaning, can you say that there can be seduction, say, six months after the first act of immoral intercourse?]

It is submitted that that cannot be said.

[Jelf J.: If the word "seduction" is used for the first time in a statute, it must have its ordinary meaning.

Bray J.: If the statute makes it punishable for parents to cause or encourage a man to have connection with their daughter under the age of sixteen years, there was no necessity for the use

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of the word seduction. Carnal knowledge, the word used in another statute, would have been the appropriate term to use.]

Burns had a right to be in the barn, and the female appellant did tell him to go away.

H. C. Dickens, for the Crown. Burns, according to a statement made by him, was prepared to swear that his immoral relations with the girl continued all the time; but, when in the witness box, he swore that he had had connection with her on two occasions only.

[Lawrance J.: If this were a charge of carnal knowledge nobody could doubt the correctness of the conviction. Can it be said that a woman is seduced every time she has immoral connection?]

The jury found that this unlawful connection was going on throughout the period they were living together. Counsel referred to Webster and other dictionaries as to the meaning of "seduction," and pointed out that actions in tort for seduction were not limited to cases where the female was a virgin—*e.g.*, *Hodsoll* v. *Taylor* (1873), L. R. 9 Q. B. 79; 43 L. J. Q. B. 14; 29 L. T. 534; 22 W. R. 89; Q. B.—and contended that the section in question applied to the case of all children who could be said to have been leading a chaste life.

[Bray J.: The phrase "action for seduction" is in your favour. According to the indictment the seduction took place in September, but according to the evidence it took place before then—in May. The immoral intercourse in September could not relate back to the seduction in May, for the indictment upon which the appellants were convicted did not allege the offence in May.]

Lawrance J. after reading the indictment said: The father and mother with their children were living in a barn, and Burns was living with them. While so living Burns had carnal connection with the girl. She became pregnant, and Burns was convicted and punished. The jury were warranted in coming to

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the conclusion they did, notwithstanding Burns's denial that he had no connection with the girl after June. The father and mother were indicted for causing and encouraging the seduction of the girl. The question is what is the meaning in the section of the word "seduction." (His Lordship reads the section.) Is the word to be used in the wide sense of carnal connection on any occasion; or is it to be restricted to inducing a girl to part with her virtue? That seems to me to be the key to the whole case. If it is to be used in a wide sense, the conviction was right, but if it is to be taken in the restricted sense the conviction cannot stand. The word "seduction" must, I think, have its usual meaning; because if the intention of the Act were as now contended for by the prosecution, the word "seduction" would not have been used. I entertain no doubt whatever that the term in the section is employed in its popular sense. The convictions must be quashed.

Convictions quashed.

ALBERT STEWART.

Albert Stewart.

Habitual criminal—All previous convictions submitted to the jury must be strictly proved.

The onus is on the Crown to prove that the prisoner has been persistently leading a dishonest life, and not upon the prisoner to prove that it has been honest.

This was an appeal by leave of Bucknill J., against conviction as a habitual criminal, and an application for leave to call further evidence. Appellant pleaded guilty to stealing a horse and dog-cart and was convicted of false pretences at the Central Criminal Court on the 11th February, 1910, and sentenced by Mr. Commissioner Rentoul to three years' penal servitude and to five years' preventive detention.

E. Fulton, for the appellant (under sect. 10 of the Criminal Appeal Act), who was present: Under sect. 10, sub-sect. 4 (b) of the Prevention of Crime Act, 1908, the charge of being a habitual criminal must not be inserted in an indictment unless not less than seven clear days' notice has been given to the proper officer of the Court by which the offender is to be tried, and to the offender that it is intended to insert such a charge, and the notice to the offender

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must specify the previous convictions and the other grounds upon which it is intended to found the charge. I cannot find in the transcript of the shorthand notes any evidence as to notice, except that of a police officer who said that he served the notice on the prisoner; there is no evidence that notice was given to the clerk of the Court as required by the statute. Such evidence is necessary. It may be given by some clerk from the office of the Clerk of the Peace, and it does not appear to be essential that the evidence should be given by the Clerk of the Peace himself. One of the grounds set out in the notice in November to the appellant was "that between the 10th May, 1909, and the 16th October, 1909, you were in honest employment which you abandoned and re-commenced your dishonest and criminal life." Appellant desires to call witnesses upon this ground to prove that the honest employment referred to was with the Church Army, and that he did not abandon it, but, that having been five months with the Church Army—a period in excess of that prescribed by their rules—he obtained a situation. There was some evidence that appellant had thrown up his employment with the Church Army, but that was an error, and appellant asked that an officer from the Church Army, who had been in Court, should be called in order to prove that he had not abandoned the employment, but the witness was not called. Counsel read a letter from an officer of the Church Army to the effect that appellant had been four months in their employment and had been permitted exceptionally to remain another month, but not longer. In the circumstances, it was not correct to say that the appellant had abandoned his employment. In his summing up the learned judge referred to three or four convictions of which—all of them before the statutory three in the notice—no evidence was given, although evidence was given of the three convictions mentioned in the indictment. Further, the learned judge made it matter of affirmative proof for appellant to shew that he had tried to obtain honest employment. Counsel cited *Turner*, 3 Cr. Ap. R. 103; 74 J. P. 81; 26 T. L. R. 112 (1909), and *Waller*, 3 Cr. Ap. R. 213; 74 J. P. 87; 26 T. L. R. 142 (1909).

[Jelf J.: You say it is misdirection to put the onus of honest life on the appellant.]

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Raven, for the Crown: Surely every conviction is relevant to "honest life"?

[JELF J.: Yes; but must there not be evidence?

BRAY J.: The judge had the Calendar before him, and read out from it his previous convictions?]

No doubt.

[BRAY J.: But that is not enough.]

That is a mere technicality; once you have the three statutory convictions, that is enough, and it is submitted that the judge may make use of his knowledge of the Calendar.

[JELF J.: Yes; but it is not enough to get a verdict; he may use it for apportioning punishment—that is elementary.

BRAY J.: Look at the last lines of the summing up—that part which affects the jury most: "All his life has been a criminal life."]

I did not prove the other convictions because the three statutory ones covered the period from 1899 to the present time—about ten years. I thought that it was immaterial whether the jury knew of the others or not.

[JELF J.: But surely each conviction goes to the point of being "habitual"? Because the prosecution covers a longer time, the "habitual" question is none the less affected.]

It makes no difference here.

[BRAY J.: But the learned judge nowhere says, "You must before you convict, find that he is leading a persistently dishonest

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life." All he does say is, "You must say whether he has proved to your satisfaction that he has led an honest life." He ought to have said, "Is it proved to your satisfaction that he has been leading a persistently criminal or dishonest life?"]

Certainly there was no direction in terms of the statute. We say that the work he went to was not honest work—he went to Smith, another prisoner.

JELF J.: The Court is of opinion that the conviction as a habitual criminal must be quashed. Such a conviction is part of a new scheme of the Legislature with the view rather of curtailing the primary sentence. But certain definite things must be proved. One is the notice of the charge—here a minor matter. Then there must be three statutory convictions proved. But that, again, is not enough; anything else tending to shew that he is a habitual criminal may be permitted, but it must be proved with exactly the same care on the part of the judge as in any other case. Every conviction adds one more chance to conviction as a habitual criminal. Hence, the procedure in this case was absolutely wrong, for the simple reason that there was no evidence of certain convictions; if there had been, all would have been right. Nor do we say that it is necessary to prove them in any particular way. Many things are intended by law to be in the judge's mind, but not in the jury's. Further, the learned judge several times told the jury that the burden of proof lay on the defendant that he had been living an honest life. This is a subversion of the general rule. It does not follow, because he is not getting an honest living, that it must be a dishonest one—he may be doing nothing. Probably the jury were misled by these two capital mistakes, and probably, therefore, there has been a miscarriage of justice.

Conviction as habitual criminal quashed.

JOHN WEST.

On an indictment for attempted rape, a positive direction to the jury to convict of indecent assault is a ground for quashing.

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This was an appeal against conviction by leave of Bucknill J., and an application for leave to appeal against sentence.

Appellant was convicted at the Lincoln Assizes on 17th February, 1910, of indecent assault, and sentenced by Darling J. to eighteen months' imprisonment with hard labour.

A. Moresby White for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The learned judge was wrong in directing the jury that if they believed the story told by appellant himself they were bound to convict him of indecent assault. The indictment was for an attempt to commit rape, with a count for indecent assault. The prosecutrix said that as she was getting over a fence, appellant, after passing a few remarks to her, got hold of her right leg, pulled her to the ground, fell on her; that she then struggled and screamed, and that appellant got up and ran away. Appellant, on oath, denied that he pulled the girl off the fence. He said that he was helping her over when she fell into his arms as if fainting, and that he laid her on the ground like a little child; that he himself never got down on the ground, that he did not indecently assault her; that all he did was, when she started screaming, to put his hand on her mouth, and when she started screaming a second time, to run away. In charging the jury, the learned judge said: "Of course, you may believe what he says, but if you believe that he told you the absolute truth, can you have any doubt that that was an indecent assault upon her?" And, again, at the end of the summing up, there is this passage: "If he did it, certainly in the way which the girl has told you, and even if he did it in the way he has told you, it is certainly an indecent assault." The summing up was in effect, not an analysis and explanation of the evidence which would help the jury to arrive at a fair conclusion, but a direction to convict of indecent assault.

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[JELF J.: It was a direction to acquit the prisoner of the graver charge and to convict him of the lighter charge, the indecent assault.]

P. E. Sandlands for the Crown. The summing up was fair. The passages complained of were followed by a direction to the jury to consider gravely whether appellant was guilty of indecent assault; if fairly read those passages did not refer to the whole of his story, but only to so much as admitted that he went to the girl for an improper purpose, and that having, in his own words, put her on the ground, he put his hand on her mouth to stop her screaming. That was consistent only with an indecent assault.

[LAWRANCE J.: There was evidence of indecent assault; but the question is whether that evidence was left fairly to the jury.]

I rely on the proviso to s. 4 (1) of the Criminal Appeal Act. There was no miscarriage of justice.

[JELF J. referred to the judgment of Channell J. in *Cohen and Bateman's* case, (1909) 3 Cr App. R. at 207.]

LAWRANCE J.: The appellant is entitled to succeed on the ground of misdirection. Great care is necessary in trying cases of this kind, as juries generally hold strong views in favour of the woman who has been attacked. In this case the learned judge did not want the jury to return a verdict of rape; but it ought to have been left to them whether or not the prisoner committed an indecent assault upon the prosecutrix. The fact that he did not leave the question of indecent assault to the jury was, in our judgment, a misdirection. A judge must not put himself in the position of the jury as regards the decision of facts. The proviso to s. 4 (1) does not apply where the judge decides facts instead of the jury

Conviction quashed.

ARTHUR ALLEN.

On indictments under the Punishment of Incest Act, 1908, *evidence of similar offences to that charged is admissible.*
Witnesses who could have been called at the trial will not be called on appeal.

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Arthur Allen.

This was an appeal against conviction on grounds involving questions of law, an application for leave to appeal on grounds involving questions of fact, and an application for leave to call further evidence.

Appellant was convicted on Feb. 24th, 1910, at the Derby Assizes before Mr. Commissioner Parfitt, K.C., of incest with his sister and sentenced to three years' penal servitude. The trial was held *in camerâ* as required by the Punishment of Incest Act, 1908.

R W. Cracroft, for appellant (under s. 10 of the Criminal Appeal Act), who was not present. The ground of appeal in substance is that the prisoner had no fair trial of the issue on the indictment. Conscious unfairness of the Treasury counsel is not suggested, but he is charged with a total misconception of the nature of the evidence legally admissible on this charge, and consequently with opening irrelevant and prejudicial matter and harping upon it to the very end of the Crown case. The points I make are these:—

(i) Counsel improperly opened for the Crown, against protest made at the time, a series of acts of incest not charged in the indictment nor proved in evidence.

(ii) The Commissioner, on objection taken to evidence bearing on one such act, improperly amended the indictment from the date laid, Nov. 9th, 1909, to "on or about March 15th," 1909.

(iii) The Commissioner improperly refused to rule finally on the objection, saying he would shut out the evidence tendered for the present, and he kept it hanging over the prisoner's head throughout the Crown case.

(iv) The Commissioner failed and omitted to direct the jury to disregard the irrelevant matter opened but never proved to them, and thereby gravely misdirected them to the prisoner's hurt.

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To take these in order. Appellant was charged upon an indictment containing one count only, charging the commission of the offence on Nov. 9th, 1909. Counsel improperly opened for the Crown, against protest, that the girl was delivered of a child on December 15th, and claimed to go into the conduct of the parties during twelve months before that confinement. (Counsel read his note of the opening for the Crown.)

On objection taken to evidence of the paternity of the child, counsel for the Crown moved for leave to amend the date in the indictment from Nov. 9th to March 15th, which the Commissioner improperly granted. The mere granting of such an amendment necessarily brought home to the jury's minds that the Crown relied on at least two acts of incest, one in November and one in March, which on this indictment could not legally be either proved or alleged.

[LAWRANCE J.: We are not trying the paternity of this girl's child.]

No, and this is the gist of my complaint. The fact of the confinement was unfairly and irrelevantly opened on this indictment charging crime on the 9th November, the evidence of paternity was wrongly admitted against my objection, and, worst of all, an amendment was improperly granted so as to fit this unfair and inadmissible evidence, to suit the day laid to a pregnancy which ought never to have been opened, and thus virtually to charge the prisoner with two acts of incest, one in March, one in November, which must have influenced the jury.

[JELF J.: Is not the date immaterial? Except in cases in which time is of the essence of the offence the date is not material, and the practice at the Central Criminal Court in such cases is to omit the date.]

No, it cannot be immaterial where pregnancy is relied on, and an attempt is made to change the date charged so as to account for the pregnancy.

[JELF J.: Did you ask for an adjournment?]

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No. The Commissioner promised to protect me if prejudice arose from the amendment, but failed to do so. Besides, adjournment is an illusory remedy to a prisoner in the dock; the real and "sovereign" remedy, as Lord Bowen used to call it, for an oppressive amendment is costs, which cannot be given in a criminal Court. Unrestricted amendment of indictments is most prejudicial to prisoners, as it was in this case, and needs very careful watching.

[Bray J.: Is there a limit of time in the Punishment of Incest Act?]

There is no limit.

Further, the Commissioner actually asked in the hearing of the jury why he could not amend the indictment so as to lay divers dates between March and November, which of course could not be done as it would be bad for duplicity, and so further impressed on the jury from the Bench that the Crown really relied on a series of like offences which they had neither charged in the indictment nor could lawfully prove on its trial. The result was that the prisoner was tried on the French system of the *dossier*, or rather even worse, for that is proved in Court under French law, and this man was tried, as I submit, most unfairly and illegally, on suggestions from the Treasury counsel and discussions between the Commissioner and both counsel of crimes which were neither charged nor proved.

The cardinal rule of the common law is that if you charge one crime on one day, *exceptis excipiendis*, you must prove that charge and its commission on that day.

Lord Herschell in *Makin* v. *Att.-Gen. for New South Wales*, (1894) App. Cas. at p. 65, said: "It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be relevant if it bears upon the question whether

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the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

The exceptions are in matters *anvipitis interpretationis*, such as those exemplified in *Bond*, (1906) 2 K. B. 389 [above, p. 168], or false pretences or embezzlement to rebut mistake or accident. There is no exception to cover rape or incest or other sexual crimes which are *mala in se*, and cannot be committed by mistake or accidentally.

[Lawrance J.: What do you say to the practice under the Criminal Law Amendment Act? Are not like acts there proved?]

The practice certainly exists, and some judges even ask the obnoxious question from the Bench; but it is a vicious and illegal practice which has been wrongly allowed under that Act. No such practice is permitted in rape and indecent assault; and that Act makes no such change in the law of evidence as to admit it. The point is not free from authority. Such evidence was rejected in *Beighton*, 18 Cox C. C. 535, (1897) by Pollock B. Further, I pray in aid the restriction on cross-examination in the Criminal Evidence Act, 1898, 61 & 62 Vict. c. 36, s. 1, sub-s. (f). A prisoner may not even be cross-examined by any question tending to shew (a) the commission of, or (b) the conviction for, or (c) the charge of any other offence than that for which he is being tried, or (d) his bad character; and if he cannot even be cross-examined to it, *a multo fortiori* it cannot be proved in chief.

[Jelf J.: Surely that Act was passed absolutely *alio intuitu?* Your interpretation would set a trap for every prosecutor in the kingdom.]

The Act only declares and confirms the common law. The object of both is to protect a prisoner from unfair prosecution. As to the trap, if there is one, the Act sets it.

[Jelf J.: Where do you draw the line?]

Where Parliament drew it in the Act. Matter of inducement and behaviour, if it does not prove the "commission" or "charge"

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or "conviction" of another offence or "bad character," is admissible; but if it "tend to shew" any of these it is not admissible either on cross-examination or in chief. The Punishment of Incest Act does not change the law of evidence; but curiously enough the Children Act, 1908, 8 Edw. 7, c. 67, s. 32, sub-s. (3), does make exactly this change. Under the latter Act "subject as aforesaid, evidence may be taken of acts constituting or contributing to constitute the offence and committed at any previous time." It is not immaterial to observe that Phillimore J. under the earlier Children Act which had no such clause shut out evidence of acts committed before the limited time. (Counsel read the note of the evidence and the Commissioner's summing up.)

[BRAY J.: The Commissioner directs as to more than one offence.]

Yes, and that in itself is a grave misdirection, and he gave no direction to the jury to disregard the irrelevant matter of other offences opened and harped upon during the trial but neither charged nor proved, and if counsel open irrelevant and prejudicial matter which he does not prove, that of itself is reason to upset a verdict. *Praed* v. *Graham*, 24 Q. B. D. at 55, *per* Lord Esher M.R.; 59 L. J. Q. B. 230; 38 W. R. 103 (1889); *Chattell* v *Daily Mail*, (1901) 18 T. L. R. 165, *per* Collins M.R.: *Wallace* v. *Cook*, Times Newspaper, 15th June, 1903, p. 3, *per* Collins M.R.; *Watt* v. *Watt*, (1905) A. C. at 117, 74 L. J. K. B. 438; 92 L. T. 480; 69 J. P. 249; 21 T. L. R. 386; 53 W. R. 547; H. L., *per* Halsbury L.C.

[JELF J.: That seems to be so if the jury were in fact misled.]

In those cases new trials were ordered; but here the conviction ought to be quashed as no new trial can be had.

[BRAY J.: Setting this one-count indictment aside, do you say these offences could not be legally proved at all?]

Subject to the Crown being put to elect between an oppressive number of charges, evidence of such acts might be admitted

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under a properly drawn indictment, but the Court is dealing with an indictment with one count only.

[Jelf J.: Then if they would be admissible on a proper indictment, how is there any substantial miscarriage of justice?]

Because the prisoner was tried throughout in an atmosphere perhaps not improper in affiliation or divorce, but certainly most unfair in a criminal Court. The Court may think there is a blot on the law in the inadmissibility of evidence of the commission of such crimes on system; but I submit the law is so, and it is for Parliament alone to amend it.

[Bray J.: Could not the prosecution allege that there was continuous intercourse?]

Not on this indictment, to which the Crown must be held. Take the case of indecent assault.

[Bray J.: Indecent assault does not follow indecent assault; but the inference that might be drawn from continuous living together is another thing.]

Nor does incest follow incest; nor was any such living together proved or hinted at here.

[Jelf J.: Do you go the length of saying that evidence of an act which constitutes another crime must not be given, but that if the act does not constitute a crime, being an act, say, of conduct only, evidence of it may be given?]

Yes. My submission is that upon this one-count indictment, not being an indictment with several counts charging several acts of incest on different dates, it was not permissible to the Crown to open or to give evidence of any act of incest other than the act alleged on the day specified in the indictment. Evidence of any offence not charged by the indictment ought to be absolutely excluded. As to evidence of general conduct from which the jury may draw the inference that an act of incest has been committed, such evidence is so dangerous and the ground of inference so un-

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substantial that it ought not to be admitted. If a man is being tried for a particular crime, the law does not allow evidence of other crimes to be given against him in order to shew that he is a person with a propensity for the commission of the species of crime in question, and for the same reason evidence of conduct tending to suggest that a person has committed a particular kind of offence should be excluded. At all events, such evidence should not have been given except in so far as it related to the particular act of incest mentioned in the indictment.

[JELF J.: Suppose the indictment in this case contained no date, you could not quash it.]

No, but I could demand particulars as of right.

[JELF J.: And if it contained an impossible date you would not want an amendment. The variance between the true date and the impossible date would not be material.]

Admitting all that, it does not follow that upon trial for one offence evidence can be given of another offence not mentioned in the indictment.

I ask for leave to call further evidence. The defence was undertaken in circumstances which left no time to consider the statements of persons who could be called to prove an *alibi* for appellant. No witness was called on his behalf at the trial.

Ryland Adkins, for the Crown, was not called upon.

JELF J.: We are all of opinion that we need not call upon Mr. Adkins. On behalf of the appellant it has been urged that it was wrong upon the trial to admit evidence of incestuous acts other than that charged in the indictment. We have been considering whether there has been a miscarriage of justice because these things were introduced, or rather hinted at, in evidence, and their effect was not removed by the learned Commissioner in summing up. It has been admitted that if the indictment stated nothing about time it could be amended so as to state a certain date; and subject to an application to the judge to separate the occasions, the evidence given would be admissible.

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In that event, if counsel for the defence applied that the prosecution should be put to their election as to what charge they would proceed with, the learned Commissioner would probably answer that in defence of morality and of the mischief of the Act for the Punishment of Incest it was necessary to shew what the circumstances were. Though every attempt was made to keep the case to one point, the appellant is in the same position as if the indictment were drawn as stating acts done on divers occasions. In this case we think that there has been no real prejudice and no miscarriage of justice. As to the application for leave to call evidence in support of the *alibi* and some other evidence not called at the trial, we will not allow evidence passed by at the time of trial to be brought forward afterwards in the Court of Appeal.

Appeal dismissed.

BEFORE

MR. JUSTICE LAWRANCE, MR. JUSTICE CHANNELL, AND MR. JUSTICE JELF.

FREDERICK WILLIAM HORNER.

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Frederick William Horner.

The Court will not grant bail when it believes that the application is made for the purpose of delaying the appeal.

This was an appeal against conviction on grounds involving questions of law, an application for leave to appeal against conviction on grounds involving questions of fact, and an application for leave to call further evidence. The appellant was convicted on 11th March, 1910, at the Central Criminal Court, under the Post Office Act, for forging telegrams, and was sentenced by Bray J. to six weeks' imprisonment in the second division. Application had been made in writing by the appellant to the single judge (Lawrance J.) for bail, and had been opposed by *R. D. Muir,* for the respondents. The application was refused on the ground that the appeal could be heard almost immediately. On March 18th *Eustace Fulton* applied to the full Court for bail, but the application was refused on the same ground.

Montague Shearman, K.C. (with him *J. A. Slater*) for the appellant, who was present. I received my instructions only this morning, and am indebted to Mr. Muir for letting me see the notice of grounds of appeal in the case. Appellant was convicted of the statutory offence of forging a telegram. He desires to appeal on the ground of misdirection. It is impossible for me to deal with the case without time for cousidering it, and I ask that the appeal stand over until next sittings. Appellant has been in the infirmary, and he came out of the infirmary this morning to be present here. He has not been well enough to instruct a solicitor. If the Court grants the adjournment I have another application to make as to bail

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R. D. Muir for the respondents. The prisoner was represented at the Central Criminal Court by Mr. George Elliott and Mr. Frampton. A week ago, on the application for bail, he was represented by another counsel, and this morning he appears by a different counsel. If prisoner is now unable to present his case properly, it is his own fault. This application ought not to be granted. It is not *bonâ fide*.

Shearman, K.C.: In criminal cases, changes of counsel ought not to weigh; they may be brought about simply for reasons of finance. If ill, an appellant should have an opportunity of properly instructing his solicitor. He has been in the infirmary; and on the ground of humanity he should be allowed out on bail so as to have every facility for meeting his solicitor. There is no suggestion that the appellant would run away; it is a question of character with him, and nothing more.

LAWRANCE J.: This is an application for an adjournment. The Court will grant an adjournment over the Easter holidays, but the appellant will not be admitted to bail. Counsel should have been instructed long ago; and for myself I do not hesitate to say that what has been done has been done purposely for delaying the appeal. If confirmed on the appeal, the sentence will run from the date of confirmation, as is usual in this Court.

Solicitors for the Appellant—*Hamlins, Grammer and Hamlins.*
Solicitors for Respondents—*Lewis and Lewis.*

Henry Field.

HENRY FIELD.

On an indictment for receiving stolen property with guilty knowledge great care must be taken when the accused is clearly not guilty of the theft, and the theft is not recent (having regard to the object stolen), to put his account clearly before the jury.

This was an application for leave to appeal against conviction referred to the full Court by Bucknill J., and an appeal against sentence. Appellant was convicted at the County of London Sessions on the 8th January, 1910, of receiving stolen property, and

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sentenced by the Deputy-Chairman to three years' penal servitude. He was at the same time convicted of being a habitual criminal, and sentenced to five years' preventive detention.

A. Bucknill for the appellant (under s. 10 of the Criminal Appeal Act), who was present. Appellant was indicted for receiving a coat, well knowing it to have been stolen. According to the evidence, the coat was stolen from the owner on the 13th November, 1909, and the appellant stated that he purchased the coat in Petticoat Lane. Appellant was arrested on the 3rd December, 1910, after he had come out of a pawnbroker's shop, where he had been offering the coat in pledge. Being in prison at the time the coat was stolen, appellant admittedly could not have been the thief. In his summing up, the learned Deputy-Chairman told the jury that the man "must prove his innocence, because the law says that where a man is in receipt of stolen property, recently stolen, he has to give an account of how he became possessed of it." The summing up was not fair to the appellant.

Cornish, for the Crown. Appellant failed to convince the jury of the truth of his story—that he had bought the coat in Petticoat Lane for eighteen shillings and sixpence. It was worth £3, and he attempted to pawn it for ten shillings.

[JELF J.: Ought not the summing up to have been scrupulous in such a case, especially as he could not have been the thief?]

The learned Deputy-Chairman carefully told the jury that the sole question for them was whether the explanation of the prisoner as to his purchase of the coat was satisfactory to them.

[JELF J.: Was it right to tell the jury, "He has to prove his innocence"?]

The property was stolen, but perhaps "prove" was too strong a word. The summing up lays down the ordinary rule as to *onus*.

[JELF J.: Is it clear that where a prisoner cannot have been the thief that possession proves receipt with guilty knowledge?]

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A man may be convicted of receiving with guilty knowledge though it is proved that he cannot have been the thief. This man was indicted only for receiving.

LAWRANCE J.: This man could not have stolen the coat. He came out of prison five days after the coat had been stolen, and three weeks later the coat was found on him. He gave an account to the jury of how he came by it. His account may be true. It was not put carefully to the jury. It would have been better to direct the jury to return a verdict of not guilty.

Conviction quashed.

Ernest Brummitt and George Matthews.

ERNEST BRUMMITT AND GEORGE MATTHEWS.

Habitual criminal—Previous convictions, other than the three statutory convictions, may be proved to the jury.

These were appeals from orders of Lawrance J. refusing leave to appeal against convictions, and appeals against sentences. Appellants pleaded guilty to larceny at the County of London Sessions on March 1st, 1910, and they were then separately given in charge to the jury as being habitual criminals, and having been convicted, were each of them sentenced by the Chairman to three years' penal servitude for the larceny and to five years' preventive detention.

Appellants were not represented.

J. A. Symmons for the Crown. The habitual criminal trials were separate trials. Brummitt complains that other convictions besides the three convictions stated in the notice served upon him were given in evidence against him. Brummitt came out of prison a fortnight before he was arrested on the charge of larceny, to which he pleaded guilty. During the fortnight he went to the Church Army on several occasions, and they promised to find him tools to do some work as a shoemaker, but, as his eyes were bad, he was asked to return on another day for the tools. Before he returned he was arrested on the charge of larceny. It is in his favour that he applied for work and could not get it.

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As to the other appellant (Matthews), he was released from prison on the 24th December, 1909, so that he had been out of prison five or six weeks before his arrest on the charge of larceny. The evidence of police officers was that this appellant earned his living by persistent thieving for fifteen or sixteen years: that since he came out of prison he was seen in company with a convicted thief, and used to drive about in a van hired by a man named Brooks, who pleaded guilty to the same indictment to which the appellant pleaded guilty. It is in favour of the appellant, however, and he worked on and off for three weeks with a military tailor, and left because he was not equal to that class of work.

CHANNELL J.: These appeals present no difficulties as to the proof of the notices and the three convictions. The only difficulty in the cases was to determine whether they came within the provision of the Prevention of Crime Act, 1908, which requires it to be proved that they were leading persistently a dishonest or criminal life at the time of the present conviction. Substantially the evidence must be brought down to the time of arrest upon the conviction with which the Court is dealing. Previous convictions, other than the three stated in the notice, are material upon the issue whether the prisoner is persistently leading a dishonest life former life is one element, and the question is, is that former life carried on now? Each of the appellants complains that such previous convictions were read to the jury. The convictions are proper evidence for the jury to consider with the other evidence laid before them. The cases of the two appellants differ somewhat. One of them was out of prison twenty-one days only. If a man is found leading a criminal life and committing another offence soon after he comes out, the jury can say he is persistently leading a criminal life. Brummitt went to the Church Army and endeavoured to get some kind of work. That is all. The next thing known about him is that he was found committing this offence in company with well-known robbers. The case of Matthews is a little more difficult. He did some honest work for about three weeks, and then he was discharged. He failed to get more work. If that were all that was known about him, it might be said that he was not persistently leading a dishonest or criminal life. But after working for three weeks he went about with well-

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known thieves. Therefore there was ample evidence for the finding of the jury. In each case the learned Chairman summed up and put the case fairly and rightly to the jury. It could not have been put more clearly to them. He said distinctly in summing up, "If he is really trying to get rid of his past life, don't convict."

Appeals dismissed.

Alfred George Edward Bright.

ALFRED GEORGE EDWARD BRIGHT.

Severity of sentence.

If a judge refrains from imposing hard labour, in order to save forfeiture of prisoner's pension under the Forfeiture Act, 1870, he is justified in making the term of imprisonment longer than he would otherwise have imposed.

This was an appeal from an order of Lawrance J. refusing leave to appeal against conviction, an application for leave to call further evidence, and an appeal against sentence by leave of the same learned judge. Appellant was convicted of larceny at the Middlesex Sessions on the 20th February, 1910, and was sentenced by the Chairman to nine months' imprisonment without hard labour.

G. L. Hardy for the appellant (under s. 10 of the Criminal Appeal Act), who was present, abandoned all applications except the appeal against sentence. When the jury found the appellant guilty, the learned Chairman, addressing him, said: "You have a previous good character. We will consider very carefully what shall be done. In the meantime you will be respited to the next sessions, and our officer will speak to you and see what can be done." It is clear that, when sentence was postponed, the learned Chairman intended to let him out on his own recognisances at the next sessions. A police officer then informed the learned Chairman that appellant, though there was no previous conviction against him, was a man of bad character. The officer said appellant was in the service of the London United Tramway Company, and that whilst there he and another man were found with a quantity of property stolen from a foreign prostitute; that he collected a sum of thirty shillings for another employer and that

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he never accounted for the money; and that he was arrested on another occasion for bastardy arrears. The appellant said the statements of the officer were untrue. The learned Chairman, after hearing the statements as to character, said he would postpone sentence until Monday. On Monday, in passing sentence, the Chairman said: "We were under the impression that this was your first case, and we should have let you out on your own recognisances." Thus the Chairman, in passing sentence, was punishing him for offences which were not proved, and which the appellant denied.

[CHANNELL J.: Ought not statements as to the character of a prisoner to be taken into account in the sentence, to the extent, at any rate, that the Court may regard them when considering whether they will let him out or send him to prison? I think such statements can be taken into account so long as he is not punished for any offence of which he has not been found guilty.

JELF J.: We must rely on the conscience of the police to guide us as to the character.]

But here appellant denied the statements made against his character; and in the result, instead of being let out on his own recognisances, he was sentenced to nine months' imprisonment in the second division. He was clearly punished, therefore, for offences of which he was not found guilty. As to the sentence, it is submitted that it is too severe. Appellant had been a soldier, and any sentence with hard labour would, under s. 2 of 33 & 34 Vict. c. 23, the Forfeiture Act, 1870, forfeit his pension.

Woodgate, for the Crown, pointed out that the Chairman had purposely not inflicted hard labour in order to save appellant's pension.

JELF J.: The only question is whether the sentence of nine months without hard labour was excessive, brought about by a view taken by the Chairman which was unwarranted, and unfair to the prisoner. The learned Chairman was at first under the impression that previously to the offence of which the prisoner

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was found guilty he had borne a good character. Consequently the Chairman thought that although liable to be sent to prison, he would let him out on his own recognisances. Later on the impression of the learned Chairman was found to be erroneous. The man had not a good character. The burden of proof that he was a man of good character rested on the prisoner, as he was asking for exceptional treatment on the ground that he was a man of good character. The witnesses who spoke to his character shewed that the offence of which he was found guilty was not his first offence, broke down the case of good character which he had set up, and justified the Chairman in withdrawing his intention of imposing a milder sentence. Did the Chairman take into account the charge denied by the prisoner, to increase the sentence, as well as in not letting him out on his recognisances? We do not think that the Chairman had any such intention. A sentence of three months with hard labour would appear to us sufficient to meet the case, but a sentence of nine months without hard labour was passed by the Chairman, as he considered it important to save the prisoner's pension, which would have been forfeited, by statute, by a sentence with hard labour. We think that the sentence of nine months without hard labour was not excessive. The appeal must be dismissed.

Appeal dismissed.

William Goodwin.

WILLIAM GOODWIN.

The slightest physical possession may found a conviction of larceny, if the jury are satisfied of the guilty mind.

This was an appeal against conviction by leave of Lawrance J. The appellant was convicted at the Salford Hundred Quarter Sessions on the 20th February, 1910, of larceny, and sentenced by the Chairman to four months' imprisonment with hard labour.

F. H. Smitton for appellant (under s. 10 of the Criminal Appeal Act), who was not present. Appellant, who was undefended, was indicted with another man, McCormick, on the charge of stealing a weight from the counter of a confectioner's shop.

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McCormick pleaded guilty. He had at once admitted his guilt to the police. The ground of Goodwin's appeal is that (1) there was no evidence that he acted with the other man, and (2) that there was no evidence that he was ever in possession of the stolen property. At the police station, when formally charged, appellant said, in reply to the charge, that the weight was never in his possession; that the other man handed it to him in a public-house, and that he dropped it from his hand when he saw the police. Appellant gave evidence on his own behalf, and called the other man as a witness. Appellant and the other man were going about looking for work. The other man entered the confectioner's shop to see if he could get any employment, appellant remaining outside. The weight taken was part of the weights on the counter. It was a small weight, and there was no evidence that appellant knew anything about it until it was handed to him in the public-house.

[CHANNELL J.: He was convicted of being a party to stealing the thing on the ample evidence of being seen with the other man going about and entering various shops, sometimes the appellant entering and sometimes the other man.]

The fact that appellant held the article for a short time in his hand, in the public-house, could not make him guilty. It was a holding of it in the presence of the other man, who, for all appellant might know, was the owner of it. In Stephen's Digest of the Criminal Law (5th ed.), article 306, it is stated that "A movable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to do so in case of need."

The Chairman of the second Court, in summing up, told the jury that the principal thing against appellant was dropping the weight when he saw the police. He did not instruct the jury so as to put them in a proper position to decide the case. There was no evidence of concert, and each man gave a reasonable account

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of his movements. The jury were told nothing as to the doctrine of recent possession; and, as appellant had never before been charged with any theft, great care was required in putting his case fairly and properly to the jury.

C. A. Lamb, for the Crown, was not called upon.

Lawrance J.: In this case there was ample evidence that the appellant and the other man were acting in concert. The suspicions of the police were aroused by their movements, and when the two men entered the public-house, the police followed almost immediately, and the weight dropped from the hand of the appellant. There is no reasonable ground for disturbing the verdict. The appeal must be dismissed.

Appeal dismissed.

Thomas McCarthy.

THOMAS McCARTHY.

Severity of sentence under sect. 10 (1) *of* 8 *Edw.* 7, *c.* 59, *the Prevention of Crime Act,* 1890.

This was an application for leave to appeal against conviction as a habitual criminal, and an appeal against sentence. Appellant was convicted at the Central Criminal Court on March 10th, 1910, of shopbreaking, and sentenced by Mr Commissioner Lumley Smith to four years' penal servitude and three years' preventive detention, which terms were afterwards altered to three years' penal servitude and five years' preventive detention (the minimum period of preventive detention being, by s. 10 (1) of 8 Edw. 7, c. 59, the Prevention of Crime Act, 1908, five years).

Appellant, in person, complained of the alteration as being from a less severe to a more severe sentence—from a total of seven years to a total of eight years.

Hurrell, for the Crown, was not called upon.

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CHANNELL J.: The sentence of three years' penal servitude and five years' preventive detention is more favourable to the appellant than the sentence first passed upon him. Under the last sentence, at the end of the three years the Home Secretary has power to release him forthwith; whereas, under the first sentence, he could not be released until the end of the four years' penal servitude. The appeal must be dismissed.

Appeal dismissed.

BEFORE THE

LORD CHIEF JUSTICE, MR. JUSTICE CHANNELL, AND MR. JUSTICE BRAY.

FRANK PALM.

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Frank Palm.

The form and the administration of the oath contemplated by sect. 2 of 9 Edw. 7, c. 39, the Oaths Act, 1909, is permissive, and not compulsory.

This was an appeal from an order of Lawrance J. refusing (a) leave to appeal against conviction and sentence, (b) legal aid, and counsel also asked for leave to call further evidence on the hearing of the appeal. Applicant was convicted at the Warwick Assizes on the 8th of March, 1910, of administering noxious things to procure miscarriage, and sentenced by Darling J. to three years penal servitude.

Dorsett for the applicant, who was not present. Applicant was charged with administering noxious drugs to procure abortion, and it became important to discover if the drug was noxious. It is not mentioned in the appeal papers, but I now ask for leave to call further evidence for the purpose of shewing that the drug was not noxious. The only evidence offered by the prosecution as to the character of the drug was the evidence of a doctor who wanted to read something from a book, but was not permitted by the learned judge. The child was born in January last; the mother died soon after, but the evidence before the coroner shewed that the drug had nothing to do with the death. The child is still living, and is a full-grown child. There were charges against applicant of administering noxious drugs on the 17th May and the 31st May 1909. There was no analysis of what was given on the 17th May: and it is submitted that what was given on the 31st May was not evidence that what was administered on the

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17th May was noxious or otherwise. There was no evidence that the deceased took any of the drug alleged to have been administered on the 31st May. She said that it remained in the cupboard until October, and the bottle and its contents were not produced at the trial. The charge was the administering of a drug on the 17th May, and it is submitted that there was no evidence of what that drug was except the evidence of the bottle on the 31st May—and the girl's description of her symptoms after taking some of the 17th May drug.

I also ask for leave to appeal on the ground that neither the jurymen nor witnesses were legally sworn. The oath was administered in the old way, and not in compliance with the new Act, which requires that the witness shall be sworn in the new way unless he desires not to do so. I think it may safely be said that all the jurors and witnesses at the Warwick Assizes were not sworn in accordance with the new Act.

[Lord Alverstone C. J.: The Act does not say that the old oath is an illegal one. It says that persons shall not be sworn in the old way unless they voluntarily ask to be so sworn.

Channell J.: My experience has been that when persons are sworn in the new way there is a great waste of time. Moreover, they never repeat the oath correctly.]

Lord Alverstone C. J.: We cannot allow an appeal as to the administration of the oath in the old way—a point which Mr. Dorsett thinks he ought to be at liberty to raise on behalf of his client, and, incidentally, on behalf of all the prisoners at the Warwick Assizes—to be raised on the hearing of the appeal. Neither can we grant leave to call further evidence; but, without expressing any opinion as to the result, the applicant may appeal against the conviction and sentence. Although no application was made under the Poor Prisoners' Defence Act, we think that, in this case, the applicant may have legal aid.

Applications granted.

WILLIAM TURNER.

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An offence within sect. 59 of 24 & 25 Vict. c. 100, the Offences against the Person Act, 1861, may also be an offence within sect. 58.

This was an appeal against conviction upon grounds involving questions of law. Appellant was convicted at the Cheshire Assizes on the 5th March, 1910, of administering noxious drugs to procure miscarriage, and sentenced by Pickford J. to six months' imprisonment in the second division.

Artemus Jones for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. Appellant was indicted for administering a noxious drug—bitter apple—to procure abortion, and there were other counts in the indictment. The grounds of appeal are (1) that bitter apple is not a noxious drug, unless taken in large doses, and there was no satisfactory evidence that the doses were large; and (2) that appellant was indicted under s. 58 of 24 & 25 Vict. c. 100 (Offences against the Person Act, 1861), which enacts that "whosoever with intent to procure the miscarriage of any woman . . . . shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing . . . . shall be guilty of felony," whereas the facts of the case shew that, if indicted at all, he should have been indicted under s. 59 of the same Act, which makes it a misdemeanour for any person to supply or procure any poison or other noxious drug, knowing that the same is intended to be used or employed with intent to procure the miscarriage of any woman. Appellant had been walking out with the girl for some time, and she got into a certain condition. He gave her, according to the girl's evidence, some pills; and after some time he asked her to go and enquire if a Mrs. Turner knew of anything, and if she did that he would go and get it for her. Mrs. Turner mentioned bitter apple, and appellant, it appears, went to a chemist's shop and purchased a packet of it, which he handed to the girl. It was admitted that appellant gave no directions to the girl as to the quantiti she should take. At the Assizes she said she heaped the bitter apple on a threepenny piece.

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[Bray J.: If the evidence of the girl was correct, it worked out at eight grains a dose, and the doctor said that that dose might produce abortion.]

The evidence as to eight grains was mere speculation. There was no corroboration of the girl's story. Being an accomplice, her evidence required to be corroborated.

[Lord Alverstone C. J.: Her evidence was corroborated in a material particular. The prisoner stated to the police inspector that he got the bitter apple from the chemist's.]

That would, no doubt, be corroboration if appellant had been indicted under s. 59 for supplying or procuring the drug; but the offence with which he was charged was administering the drug to her or causing it to be taken by her. The learned judge held that the mere fact of handing the drug to her was administering it to her.

[Bray J.: Mr. Justice Pickford told the jury that "the question here is—did he administer or cause to be administered a noxious thing?"]

That, it is submitted, was wrong in law, because of s. 59. Again this is the first case in which it has been held that, although the appellant gave no direction as to the quantity of the drug to be taken, he must be presumed to have administered it in sufficiently large quantities to procure abortion. Moreover, there was no evidence that the drug was taken in sufficiently large quantities to cause abortion. On these facts, even if an offence was committed, the charge should have been laid under s. 59; and this appeal should be allowed because the appellant was charged under the wrong section.

Ryland Adkins, for the Crown: Appellant was properly convicted under s. 58.

The label on the packet had the words, "an overdose is poisonous," and as he gave her an ounce of what in that quantity would be a noxious thing, and he told her to take it night and

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morning without any hint of the small amount which alone would be innoxious, it is clear that he intended her to take the drug in such quantities as to bring about abortion. There was evidence that he gave her other things the effect of which was to make abortion more likely under the influence of bitter apple.

[Lord Alverstone C. J.: The point is, was the drug taken in quantities large enough to be noxious? In *Cramp*, 5 Q. B. D. 307; 49 L. J. M. C. 44; 42 L. T. 442; 44 J. P. 411; 14 Cox C. C. 401 (1880); C. C. R., Lord Coleridge C. J. said that it was "proved it was noxious in the quantity administered. . . . . Some things, when administered in small quantities, are useful, which, when administered in large quantities, are noxious. In the present case the oil of juniper, as administered, was noxious." Denman J., in the same case, said: "Where a person administers with the improper and forbidden intent large quantities of a thing which so administered is noxious, though when taken in small quantities is innocuous, the case falls within the statute." I am not aware of any case in which it has been laid down that the giving of a drug without any direction as to the quantity in which it should be taken was administering a noxious thing.]

She asked for a drug, and he gave it to her, and in such circumstances that only a specific warning to take a harmless dose could negative the inference that it was administering a noxious thing. It could not be said that there was no evidence of such administration, and it was rightly left to the jury to say whether they thought the evidence sufficient; and there was also the evidence as to his having given her other things before the bitter apple.

Artemus Jones, in reply: My chief point is that the indictment should have been drawn under s. 59.

[Channell J.: Is it not possible that an offence may fall under either section? If a man gets the noxious drug for a woman, he is under s. 59: and if he goes further and causes her to take it, he is under s. 58.]

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LORD ALVERSTONE C. J.: In our judgment this appeal fails. On one point taken by Mr. Jones, that there was no evidence of corroboration, we think the evidence of the girl was corroborated abundantly. The prisoner was charged under s. 58 of the Offences against the Person Act, 1861, and there was evidence of an offence under that section, but it might also be that the offence could have been laid under s. 59 of the same Act. To constitute an offence under s. 58 there must be evidence that the person charged administered to or caused the woman to take a noxious drug. This case cannot be dealt with by looking at the transaction as to the administration of the bitter apple alone. There was evidence that, before the purchase of the bitter apple, the prisoner told the girl that he did not think there was anything wrong, and he asked her if he bought pills, would she take them? The girl said "yes," and then he supplied her with pills and other things, and asked her on no account to call in the doctor, as he might know by the smell of the things what she had been taking, and might get the chemist into trouble. Later on, according to the girl's evidence, at prisoner's request she asked Mrs. Turner if she knew of anything, and Mrs. Turner said she had heard of bitter apple, and after the girl had reported this to the appellant he bought her a packet of bitter apple, of which she took about one-half. In these circumstances Mr. Jones contends that because there was no direction by the appellant to the girl to take any particular quantity of the bitter apple there was no evidence of the administering of this drug in such quantity as to be noxious. The evidence was that the girl took about half-an-ounce in doses of about eight grains each, and that a dose of eight grains would be harmful. The question was, did the prisoner mean her to take or cause her to take a noxious thing? It was put to the jury by Mr. Justice Pickford in that way, and we think there was evidence to justify the verdict they returned.

Appeal dismissed.

VICTOR JONES.

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Murder—Where a defence of insanity has not been accepted by the jury at the trial, this Court will not interfere except on conclusive proof.

F. W. Sherwood for the appellant (under s. 10 of the Criminal Appeal Act), who was not present: Appellant is now lying under sentence of death at Usk for the murder of Violet Lilian Pick at Monmouth on the 3rd February of this year. Appellant was convicted before Mr. Justice Grantham at the Monmouth Assizes on the 15th March, after a trial in which the defence was that the prisoner was insane at the time of the act, and it is submitted that the jury ought so to have found. The appeal is entered in the list as an appeal on questions of law only, the grounds being (1) rejection of certain evidence tendered; (2) misdirection with regard to certain evidence; (3) misdirection as to the law in relation to insanity as a defence. But I shall contend that this Court is not limited upon this appeal to questions of law only, or to the grounds named, but that even if the points raised should be decided against appellant and no wrongful rejection of evidence or misdirection shewn, where insanity is shewn, the Court has a wider jurisdiction specially conferred upon it by sect. 5 (4) of 7 Edw. VII. c. 28, the Criminal Appeal Act, which runs:

'If on any appeal it appears to the Court of Criminal Appeal that, although the appellant was guilty of the act or omission charged against him, he was insane at the time the act was done or omission made so as not to be responsible according to law for his actions, the Court may quash the sentence passed at the trial and order the appellant to be kept in custody as a criminal lunatic under the Trial of Lunatics Act, 1883 (46 & 47 Vict. c. 38) in the same manner as if a special verdict had been found by the jury under that Act."

These words are ample to give power to the Court in *any* appeal, whether the defence of insanity has or has not been raised at the trial, and even though there has been no misdirection, to set aside the verdict of the jury and substitute the special verdict provided by the Act of 1883. There is conferred an altogether larger power applying to this particular class of case. And in *Jefferson,*

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1 Cr. App. R. 95; 72 J. P. 467; 24 T. L. R. 877 (1908), the Court so acted under the sub-section.

[The LORD CHIEF JUSTICE: Do you say that this Court can review the finding of the jury upon facts which were before the jury?]

Yes; the Court did so in that case, although all the evidence was before the jury, and that there was nothing wrong in the conduct of the trial, and no misdirection.

[CHANNELL J.: Is there any difference in this power from the general power of the Court of Appeal to set aside a verdict which cannot be supported on the facts?]

I contend that the special sub-section gives a wider power—a power to re-try this issue, and find a verdict anew, just as if the Court were a jury. I say that upon the facts the jury ought to have found insanity, but I am not abandoning the grounds of law stated in the notice of appeal. The facts of this case are short and simple. Appellant is a young man about twenty-one years old, who at the time of the event was living at his mother's house at Monmouth, and the victim was a young girl, Violet Lilian Pick, of about the same age, of good education and character, who was a schoolmistress in one of the public schools of Monmouth. On the evening of the 3rd February, 1910, they met and were probably together for some two hours—at all events, for a very long time—and would seem to have walked about on the racecourse, a large stretch of open ground, or in its neighbourhood. There was no evidence of a quarrel; the act was committed quite close to several houses, but no sounds at all were heard until the two or three short sharp screams which the young woman uttered just before her death. This fact, and the other circumstances of time and place, lead to the conclusion that the deed was the result of a sudden impulse. The girl was strangled with her handkerchief. If the deed had been premeditated or had been the result of any motive it would have been committed earlier, and in some remoter spot. I lay stress upon the fact that the crime, so far as can be ascertained, was quite without a motive; and though that is not

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in itself sufficient proof of insanity, yet taken with other facts tending to shew insanity, it has great significance.

[The LORD CHIEF JUSTICE: Was there not evidence that the two had been keeping company for some time, and that the girl had just become engaged to another man?]

No doubt the appellant and the girl had been meeting often, but as to the suggestion that she had become engaged at Christmas to another man, a soldier, who had given her a ring, there was no evidence of either event, except hearsay; the soldier was not called: the matter was not mentioned anywhere in the depositions, and the suggestion of jealousy was raised for the first time at the trial. Even if there was a definite engagement, there was no proof that appellant knew of it.

[CHANNELL J.: How does that help you? On the night of the crime he may have heard for the first time of her engagement from the girl herself, and seen the ring.]

But there is no evidence of this; there was no proof that she was wearing the ring, and she had gloves on. The probability is that she kept her affair with the soldier (if it was at all serious) a secret from appellant. Not long before the murder appellant said that he believed himself to be "the favoured one." A few days before they had been dancing together at a ball a great deal, and her conduct in spending a long time with him on this evening shews that it was not he, but the soldier who had cause for jealousy. That appellant loved the girl was clear; and their friendship was free from any disgraceful circumstance likely to prompt him to destroy her. Then it is remarkable that on this night, after they had been wandering for so long a time over the racecourse, where he could have found many opportunities at some lonely spot of pushing her into the river Monnow, which flows very full and deep and strong, with steep banks, round the open ground where they were walking, he should have deferred the accomplishment of any evil design (if he had one) until they had crossed the river on their return, and arrived nearly at the road and come within easy hearing distance of many people. The deed was actually done within a few yards of the road, near the

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Old Gaol, where, as appellant knew, a policeman lived. Then after the act, appellant made no attempt to escape from the spot; with every opportunity of doing so, and with a choice of many directions, and a certainty that he could have returned unobserved to the town by various ways, he stood still by the dead body for fully fifteen minutes waiting for a constable to come up to him. He must have seen the constable and another man searching, at first vainly, with a lamp to find where it was that the screams had come from, and yet he waited until he was found. He could see the lamp; he could notice the movements of the two men, and he could have easily escaped, and would have left no trace behind him; then there would have been suspicion only against him. When he is at last found, he announces who he is, before the constable has time to recognise him, or to see the body of the dead girl, and says: "I murdered the girl because I loved her," shewing at the time and later the most astounding calmness, or semblance of calmness.

This crime, therefore, displays all the characteristics which Taylor and other writers upon medical jurisprudence recognise as notes of homicidal mania or impulsive insanity, viz. (1) no motive; (2) the victim an object of sincere love; (3) no concealment, (4) no attempt to escape; (5) confession of the act; (6) outward appearance of utter coolness and indifference. Even these facts, however, are not of themselves, apart from appellant's mental history, conclusive to show his insanity, but taken together with the matters now to be mentioned, are of great moment: Appellant's mother deposed with some detail to the existence of insanity in prisoner's near ancestors on both sides. Then appellant, when a boy of six, fell from the roof of a cottage to the ground —a circumstance likely to predispose even a healthy subject to the danger of brain mischief, and in his case it might help to cause or to aggravate mental weakness; and over and above all this, there was in fact a clearly established history of degeneration in his mental faculties. It was proved by medical men who saw him from time to time, by other witnesses, and by his own letters written to his mother before the crime. For some time past he had been in a low state of mental health; he brooded over imaginary ailments; he was distinctly melancholic, and the medical evidence shewed that he was going from bad to worse, and would probably end his days in an asylum. This state of ill-health was

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not unlikely to result in such an act as caused his victim's death. Shakespeare's words, "Melancholy is the nurse of frenzy," were recognised by students of mental disease as the statement of a profound truth. Then there were delusions; he was labouring under beliefs for which there was no foundation; he stated himself from time to time to be suffering from diseases from which he was free, and would take no denial from the medical men; these delusions were so definite and so persistent, that they amounted to more than mere hypochondria. One of these delusions was concerned with his food and his digestion—a delusion which was a sure sign of grave brain trouble. This state of things could not be accounted for, as the prosecution sought to account for them, by reluctance to work. He was in employment and gave satisfaction till his health broke down.

Then there were delusions as to facts external to himself; he had a few months before been in employment for a second period with the same employers at Aberdare; they had taken him back, and he stayed about a fortnight, but he was unable to continue because his mind wandered, and he was forgetful of his duties and acted strangely. Once he complained that he could not continue his round with his master's van because there was a sheet of ice thirty yards long across the road; but there was no ice at all. He stated that at Aberdare he had to work at a dangerous engine, which he expected to kill him at any moment, when in fact there was no engine at all. Then he felt himself from time to time under the spell of strange impulses—for instance, impulses telling him to seize a knife and stab his mother, or to destroy himself by throwing himself before motor cars. The act, then, of the 3rd February may well have been such an act.

[The Lord Chief Justice: He said at the time, "I murdered her because I loved her"; if he meant that, would not jealousy account for his act?]

The words are not inconsistent with that idea, but there is no evidence of jealousy, and where there is so much to suggest insanity, insanity, I submit, is the true explanation. The use of the word "murdered" does not conflict with my theory. The recorded cases of mental disease resulting in sudden crime show that knowledge of the act immediately after it is committed, and

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confession of it, are perfectly consistent with insanity; his statement really helps that plea. The medical men quite accepted the theory that if the delusions were real and if appellant really felt these impulses, he must have been insane at the time of the act, though he seemed to be sane after and before it. The medical men were young men, and gave their evidence diffidently, and not with the assurance and positiveness of experienced specialists; but the fair effect of their testimony is that insanity was made out. They accepted all the general propositions that I submitted to them, in relation to those parts of the conduct of appellant which are indicative of insanity. The learned judge, in his summing up, put it that there was no proof or suggestion that appellant at the time of the act was under any particular delusion: that was no part of my case, I did not put it forward. I merely used the delusions as symptoms of general unsoundness of mind, and I did not tie myself up to a definite theory of an actual delusion existing at the time. There is at least one instance of a delusion issuing in an act: the incident of the ice; he desisted from going on his round, and turned back.

There is another matter: the learned judge suggested to one of the medical witnesses that the lack of expressions of remorse immediately after the act were inconsistent with the theory of insanity, but the witness would not accept that. As to the evidence of the prison doctor, the effect of that was overstated in the summing up. He does not seem to have had appellant under special observation; he does not appear to have talked to him about the crime. The prison doctor may have felt reluctant to discuss the crime with him. Expressions of regret at some time after the event would be appropriate in appellant when he realised fully his act: in fact, he was full of remorse; after the verdict he expressed his sorrow quite well, and in doing so he said: "I suppose I must have done it; I cannot remember doing this terrible crime. . . . I had no cause for doing it." Before his trial he had made similar statements as to not knowing what he was doing. He wrote out a statement in Usk Prison, on the 9th February, six days after the crime, in answer to a request from his solicitor. It was this letter which I tendered in evidence, but which Grantham J. rejected. I tendered it on the question of insanity alone, and I submit that it was admissible, as shewing in what way he regarded the event afterwards, and therefore as evidence of his mental state.

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Grantham J. ruled it inadmissible because it was written to the solicitor. It is produced by the representative of the Home Office.

[The document was read; in view of the judgment it is omitted.]

Your Lordships see that in effect this statement is an expansion of the two ideas—"I murdered her because I loved her," and "I do not know why I did it, and I cannot remember doing this terrible crime"—the first uttered just after the crime, the second after verdict. The two ideas are not really inconsistent with one another, and they support the theory of insanity. The statement was clearly admissible. I submit that it was matter to be considered by the jury as having been written soon after the act. I did not press for the admission of the letter at the trial. I gathered that his Lordship had made up his mind, and I submitted: I hope that it will not be thought that whenever counsel submissively accepts the indication of a judge's mind in a matter of this sort he is to be shut out from challenging it afterwards. I may mention that at the trial of one *Dove* in 1856 before Baron Bramwell a letter said to have been written in prison by Dove in his own blood to the devil was let in as possible evidence of insanity. (Stephen's General View of the Criminal Law, 2nd ed. (1890), page 273; History of the Criminal Law, vol. iii. 432.)

[The Lord Chief Justice: I do not think that you can complain that the statement was rejected, but you can treat the letter as before us.]

Then I contend that it supports the plea of insanity. If your Lordships should think that the opinions of the doctors called at the trial are inadequate or leave the matter in doubt, the Court has power even now to submit the facts to some person of special expert knowledge as an assessor (see sect. 9 (e) of the Criminal Appeal Act, 1907). I should like to say that throughout the case I never attempted to bring the facts shewing unsoundness of mind under the head of any specific disease; some of the facts would suit one recognised disease, some another; all sorts of special names, homicidal mania, impulsive insanity, are found in the nomenclature which medical experts have coined; some of these terms are formed with a view to the manifestation of the disease rather than to the disease itself. The multiplication of such words is often misleading, and a source of confusion. I thought it no

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part of my duty to fix my case to any special disease; whether there was epilepsy or masked epilepsy or under whatever name the facts were grouped, there was the manifest outstanding fact of grievous unsoundness of mind, and the sole question was not whether the unsoundness was better accounted for by one disease or cause rather than another, but whether the unsoundness was so grave as to have obscured appellant's power of discriminating between good and evil or of exercising self-control.

So much for the particular facts of the case. Now as to the law relating to insanity and as to the proper directions to be given, I submit that even though the learned judge may have been right in following the language used by the judges in *McNaughten* (1843; p. 75 above), he ought to have explained that language and adapted it to this case. Whether or not those dicta—the judges' answers to the Lords' questions—are binding upon this Court, the dicta deal with a special and narrow state of facts, very different from those of this case; moreover, account must be taken of two things: the great advance in medical science since 1843, and the development of legal theory as to true limits of responsibility; these two things have gone on side by side, and the language and theories of *McNaughten* are no longer adequate. Shortly, I base my contentions upon Mr. Justice Wood Renton's dissertation on *McNaughten's case* in his Lunacy, 1896 (p. 885); Stephen's History of the Criminal Law, vol. ii. c. XIX. p. 124, and Kenny's Outlines of Criminal Law, (1902) c. IV. p. 51. The upshot of the whole matter is that when we speak of "knowing" that an act is right or wrong, something more is needed than mere consciousness; and the question of knowledge and self-control are interdependent. Grantham J. ought to have explained "knowledge" to the jury in the way suggested by Sir James F. Stephen History of the Criminal Law, 1883. vol. ii. p. 171), who wrote: "It is as true that a man who cannot control himself does not know the nature of his acts as that a man who does not know the nature of his acts is incapable of self-control."

[CHANNELL J.: Did not Stephen J., sitting as a judge, lay it down even more strongly in a reported case, which I myself have followed. that mental disease, rendering a person incapable

of forming a reasonable judgment as to what is right or wrong, relieves from responsibility?]

Yes; the case is *Davis*, 14 Cox C. C. 563 (1881); see Archbold (1905, 23rd ed.), p. 29. His words are: "As I understand the law, any disease which so disturbs the mind that you cannot think calmly and rationally of all the different reasons to which we refer in considering the rightness or wrongness of an action—any disease which so disturbs the mind that you cannot perform that duty with some moderate degree of calmness and reason, may be fairly said to prevent a man from knowing that what he did was wrong."

In *Layton*, 4 Cox C. C. (1849), at 155, Rolfe B. said: "Insanity was the most difficult question which could engage the attention of any tribunal. It was difficult to define it in words or even in idea. The opinion of the judges was taken by the House of Lords a few years back, as to what was to constitute a definition of insanity, and it created very great difficulty, but after great and anxious deliberation, they came to the conclusion that the old description was the best, viz. that insanity should constitute a defence only when a party was in such a state of mind arising from disease as to be incapable of deciding between right and wrong, but that this definition was imperfect, as all definitions must be, and would require to be modified with reference to each particular case. Applying that law to the present case, he thought what the jury had to consider was, whether the evidence was such as to satisfy them that at the time the act was committed by the prisoner he was incapable of understanding right from wrong, as that he could not appreciate the act he was committing. Perhaps it would be going too far to say that a party was responsible in every case where he had a glimmering knowledge of what was right and wrong."

These passages shew that mere consciousness of the act and its nature and even of its quality is not enough in the view of those two learned judges; there must be a fair amount of competence in the exercise of a man's decision and choice of action. Further, I say that Stephen J., in his Digest of Criminal Law (article 28), is right in suggesting (with doubt) that "defective mental power" is sufficient to prevent a man from knowing the nature and quality

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of his act, and from knowing that act to be wrong; and also that a man is freed from responsibility who, whether by defective mental power or any disease affecting his mind, is prevented, at the time when the act is done, from controlling his own conduct. Two of his illustrations to this article in the Digest may be regarded as applicable to the case, *i.e.*, (2) and (4); one deals with imbecility, the other with a crime committed under an insane impulse; either or both apply; at least the one or the other must. All the evidence in the case shews that insanity of some sort acting in some way must be the true explanation.

[The Lord Chief Justice: There is nothing to shew that the appellant did not know the difference between right and wrong.]

Surely there is enough shewn to make it certain that at the time his sense of the difference was obscured. And there is ample evidence here to justify your Lordships, placed as you are in the position of a jury, in drawing the inference that appellant at the time was by insanity or imbecility overmastered and dispossessed of his power of self-control. Sir J. F. Stephen put forward the more liberal doctrines as moot points, but this Court has power to adopt them as decisions and to declare the law. I submit that appellant is not answerable for his act, and ought not to pay the supreme penalty of the law.

F. C. Mackarness and *St. J. G. Micklethwait* for the Crown, were not called upon.

The Lord Chief Justice: This case has been fully and most ably argued, and all the facts are before the Court; but we are unable to come to the conclusion to which we are invited. We are asked, under sect. 5 (4) of the Act to substitute the special verdict provided by the Trial of Lunatics Act, 1883, for the simple finding of the jury, and to order the appellant to be detained during his Majesty's pleasure. Two considerations must be borne in mind. First, it must not be forgotten that the large powers possessed by the Home Secretary remain untouched in any way by the Act constituting this Court. He may rightfully act upon grounds, and take into consideration many circumstances, which

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this Court cannot accept as in law sufficient to justify a verdict of insanity. Secondly, it is in this case not necessary to discuss what are the limits of our jurisdiction under sect. 5 (4) of the Act. It is sufficient for us now to say that if we considered the verdict unsatisfactory, on the ground of insanity, we have power to inquire into the state of mind of appellant, and to set the verdict aside. We agree with counsel that there is no ground for suggesting that appellant has been feigning insanity or doing anything of the sort. The letter which has been read accords with that view; it expresses, no doubt, as did his statement after verdict, his genuine feelings. I express no opinion as to the admissibility of that statement as evidence at the trial; the learned judge had not been pressed to admit it, and it would be wrong to say that he had rejected it. The verdict of the jury was given without that document being before them. Neither the letter nor the other facts adduced were sufficient to prove insanity existing at the time of the crime. Yet the evidence did shew that the appellant was to a certain extent off his mental balance; the statements which from time to time he had made about his health, and his desire to throw himself under motor-cars, and other circumstances of that sort, pointed to some kind of mental infirmity. But all these matters taken together fall short of such proof of insanity as would justify us in saying that the jury were wrong in finding the verdict which they did. It is enough to say that appellant knew the nature and quality of the act which he did.

As to the summing up, without dwelling on any particular passage or scanning its language closely, we think that, substantially, the real issue was left very fairly to the jury. There seems to have been some evidence of mental infirmity and of a partial unhingeing of the mind. There is no need here to enter upon a disquisition as to the terms in which the question ought to be left, where a person is prevented by defective mental power or mental disease from knowing the nature of his acts or from controlling his conduct. It is not made out in this case that appellant was not in a condition to be aware of the nature of his act or that he was prevented from exercising self-control. A grave responsibility will lie upon this Court whenever it shall become necessary to decide those large

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and important questions which have been raised in the argument of appellant's counsel; when that day comes, the Court will not shrink from the duty of deciding those matters of controversy and of declaring the law. But in this case they do not arise.

Appeal dismissed.

John Alexander Graham.

JOHN ALEXANDER GRAHAM.

On the trial of an indictment for carnal knowledge corroboration of the prosecutrix's evidence is not legally necessary, and a judge is entitled so to direct the jury.

This was (a) an appeal against conviction upon grounds involving questions of law, and (b) an appeal by leave of Lawrance J. against conviction upon grounds involving questions of fact. Appellant was convicted on the 5th March, 1910, at the Cheshire Assizes of carnal knowledge of a girl under sixteen, and sentenced by Pickford J. to imprisonment for nine months with hard labour.

Artemus Jones for appellant (under s. 10 of the Criminal Appeal Act), who was not present. There were two indictments against appellant: (1) for rape, and (2) for carnal knowledge of a girl under sixteen. The indictment upon which the Crown proceeded against appellant was the one for carnal knowledge. The ground of appeal is that the learned judge did not fully direct the jury. There was no corroboration of the girl's story. Appellant was for many years in the Birkenhead Police Force, and at the time of the offence in question he was carrying on with his wife a fruiterer's business in Market Street, Birkenhead. The girl and her parents were acquainted with appellant and his wife, and they used to make purchases at appellant's shop. On the 2nd November, about 7.30 in the evening, the girl, according to her own evidence, went to the shop for the purpose of going to the theatre with appellant's wife; but, the wife having already gone, the girl remained at appellant's until nine o'clock, having been about twenty minutes upstairs playing the piano, and the remainder of the time in the kitchen, which is on a level with and at the back of the shop. The girl said that when she went into the kitchen, appellant threw her down and had

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forcible connection with her. Anyone coming into the shop could see through a glass window into the kitchen. Although the offence was alleged to have occurred on November 2nd, the girl made no complaint to her mother or to anybody else until December 2nd. A doctor, whom the girl saw, thought at first that the girl was suffering from gonorrhœa; but, when appellant was arrested, he submitted to examination, and no trace of that disease was found upon him. Upon more careful examination of the girl, the doctor found that what she was suffering from was leucorrhœa, an ailment which is not uncommon with girls of her age. Mr. Justice Pickford instructed the jury that no corroboration of the girl's story was necessary. At the commencement of the summing up he said: "You have been told by counsel for the defence that you must have corroboration in this case. Now that is not quite correct. There are cases in which the legislature requires corroboration, as, for instance, in the case of a child who is too young to understand the nature of an oath, and in the case of an accomplice who has taken part in the crime. But this is not one of those cases, and as corroboration is not required, you are entitled to act, if you think right, upon the evidence of the girl, but of course you have to be very careful in accepting the evidence of one witness against the evidence of another."

[CHANNELL J.: In so instructing the jury, I think Mr. Justice Pickford was right.]

But it is very dangerous to act upon uncorroborated evidence in cases of this kind. Again, I complain of the girl's answer on re-examination. In answer to my learned friend as to why she did not, until a month had elapsed, make any complaint to her mother or father or sister, she said: "I was too frightened. He threatened me so much. I was afraid to tell anybody. I did not know what he would do to me if I did. I thought he would kill me or something, if I told anybody. I had heard of so many children." If the jury heard the last few words, they may have drawn from them an inference most serious for appellant.

[BRAY J.: The question was a proper question, and the girl was entitled to answer fully.]

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Still the words may have influenced the jury in finding a verdict against appellant; for, after conviction, the learned judge inquired of the Chief Constable of Birkenhead if there was any foundation in reference to appellant for the words of the girl as to what she had heard of other children, and the answer was, "None whatever." Another point which is very curious is that in her examination-in-chief the girl, when asked to state what took place, rattled off, like a recitation, the incidents of the alleged assault; and when she was asked the same question in cross-examination, she repeated the same answer word for word. The answer occupies about eighteen lines of the transcript.

[LORD ALVERSTONE C. J.: You are entitled to refer to the similarity of the statements, but the similarity does not shew that her answer was necessarily untrue.]

It is further submitted that it is consistent with the medical evidence that the hymen might have been interfered with by mechanical means.

Coll Williams for the Crown: The girl said that appellant attempted to take liberties with her again a month after the date of the crime of which he was convicted, and she then told him she would tell her mother. Moreover, the fact that she did not complain at once is sufficiently accounted for by the fact that she said she was afraid of the man.

CHANNELL J.: Various points have been raised on behalf of the prisoner which the Court must deal with. It has been urged upon us that there was no corroboration of the girl's story. We think, however, that Mr. Justice Pickford was right in the way in which he dealt with that question. It is not a case in which corroboration is necessarily required. But it is one of those cases in which the judge should explain that the burden of proof is upon the prosecution to make out the case to the satisfaction of the jury; that it is dangerous to act upon the evidence of one person, and in which the judge should point out to the jury that they had one person saying one thing and another person another thing. Mr. Justice Pickford pointed out the risk of acting on the evidence of the girl, unless corroborated; and at the same time he explained

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that strictly speaking the law did not require that her evidence should be corroborated, and that if they believed the girl's evidence they could act upon it. Undoubtedly, there was corroboration of parts of the girl's story. For instance, the doctor negatived the possibility of the use of mechanical means; and, under the circumstance, that was corroboration of a part of her evidence, although it was not corroboration of the part in which she put the blame on the prisoner. We do not re-try a case properly tried by the jury. But if we were re-trying the case we should come to the conclusion that the girl consented to a greater extent than she said. There were two alternatives for the jury. The girl had connection with the prisoner or with somebody else. These were the alternatives. If she had connection with the prisoner she was not an entirely truthful girl, but her untruthfulness was in defence of her own character, and women will lie on that point often when the rest of their story is true. That was not pointed out to the jury; but, with that possible exception, everything was put fully to them. As to the similarity referred to as existing between her statement before the magistrate and the statement made by her before the jury, the explanation may be that she learned her proof before the magistrate by heart. Unless we are to re-try cases we can do nothing in a case like this. It is not because the jury might properly have found the other way that we can do anything. We are not authorized to re-try the case. The appeal must be dismissed, but the sentence will run from the date of conviction.

Appeal dismissed.

JOHN BIDDULPH.

John Biddulph.

The Court will not, in view of the proviso to sect. 4 (1) *of the Criminal Appeal Act, quash a conviction on the ground of the misreception of unimportant evidence.*

This was an appeal against conviction upon grounds involving questions of law. Appellant was convicted of larceny from the person, at the Birmingham Assizes, on the 12th March, 1910, and sentenced by Darling J. to penal servitude for three years.

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Marshall Freeman for appellant (under s. 10 of the Criminal Appeal Act), who was not present. Appellant was charged with stealing a purse from the pocket of prosecutrix in Bull Street, Birmingham. The sole question at issue was the identity of appellant with the man who snatched the purse. The ground of appeal is that the learned judge intervened in a manner that conveyed to the jury knowledge of the fact that appellant had been previously in prison. It appears that after the purse was missed prosecutrix and her husband went to the detective office in Birmingham; and, in giving his evidence-in-chief, the husband said: "We went on to the detective office, and they shewed me a book and asked me if I could give a description of the man, and they wrote it down, and they asked my wife to pick him out. I was not certain from the picture. It was a sideways picture." The learned judge then directed the witness to look at the prisoner in the dock and say if he recognised him.

[Lord Alverstone C. J.: The answer was: "That is the man right enough. You could not make a mistake once you saw the man. It is impossible."]

Then the learned judge asked: "Have you got the photograph?" and was answered by Superintendent Daniels: "It is up in the office." Daniels was thereupon directed by the learned judge to "get the album." The wife, though she had given her evidence, was re-called and, upon being asked by Darling J. if the photograph (produced) was the one shewn to her in the office, answered "Yes." I made a formal objection to the reception of evidence of that character. In my cross-examination of the witnesses I made no mention of, or reference to, the photograph, but the learned judge thought that I had done so, and thus made the photograph evidence. After explanations, however, the learned judge said that he thought it would be better not to make any further reference to the photograph, and that the jury had better not see it.

[Lord Alverstone: Have you any authority for saying that, if evidence of that kind comes out by accident, the prisoner ought not to be convicted?]

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No—but the matter should be determined on general principles. Every effort should be made to keep from a jury the knowledge of a prisoner's antecedents. This is the principle underlying the Criminal Evidence Act, 1898, which enacts that a prisoner, when giving evidence on his own behalf, shall not be asked any question tending to shew that he has committed or been convicted of any other crime. Appellant did not give evidence at the trial; but, supposing he did, he could not have been asked about the photograph. If he had, it would have been a mistrial, and this Court would quash the conviction. The photograph shewed that appellant had been convicted of another crime, and it was as improper to ask another witness about the photograph as it would be to ask appellant himself about it. Unless there was a proper ground, and there was no such ground, for disclosing the photograph to the jury, it should not have been mentioned in their presence.

[CHANNELL J.: You must shew it brought about an erroneous result.]

I will deal with that. In the police album there is a photograph of the prisoner. The woman identified appellant only after the photograph had been shewn to her. Her husband also, after seeing the photograph, and after communicating with his wife, went to the police station and picked out this stout man. But for the introduction of the album into the case, the verdict might have been different.

[CHANNELL J.: The learned judge may have thought that if he saw the photograph, it would shew that prisoner was not the man. What happens in finger-print cases?]

As regards the jury, it is reasonable to assume the verdict was unfairly influenced by the introduction of the photograph. In finger print cases, what takes place has no analogy to the introduction of an album of convicted persons. In finger print cases the evidence is, "I saw this man at the station; I took a print of his finger and sent it to London." At London they take a photograph of the print, but they do not reveal in evidence the fact that they already have a similar impression on record. They

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merely shew that the mark left behind by the burglar corresponds with the print of accused's finger. My submission is that the conviction should be quashed.

Dominick Daly, for the prosecution, was not called on.

Bray J.: This is an appeal upon a question of law. The appellant puts it in this way, that the reference to the photograph at the trial was an intimation to the jury that he was an old offender. There is a provision in the Criminal Evidence Act which has some bearing on the question, namely, that which states that, when giving evidence, a prisoner shall not be asked if he committed any other offence. Of course, nothing should be stated to shew that he was a convicted person. In many cases, evidence that the prisoner has been convicted of other offences, if relevant, has been admitted; and the fact that such evidence shews that the prisoner was a convicted person does not make it necessarily inadmissible. Under the proviso to s. 4 (1) of the Criminal Appeal Act, before setting aside a conviction, we must be satisfied that there has been a miscarriage of justice. Has there been a miscarriage of justice in this case? The learned judge thought that it might be advisable to look at the photograph in order to see what the photograph was. The circumstances of identification were important. Mrs. Hadfield was recalled, and said that the album produced was the one shewn to her at the office. The album was not shewn to the jury. We are satisfied that there was no miscarriage of justice in consequence of the introduction of the album or otherwise.

Appeal dismissed.

Josiah Mountford.

JOSIAH MOUNTFORD.

Severity of sentence.

This was an appeal against sentence by leave of Lawrance J. Appellant was convicted, upon his own confession, of larceny of a workman's blue slop, at Cheshire Sessions on the 20th October, 1909, and sentenced by the Chairman to penal servitude for five years.

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Appellant was not represented, and was not present.

A. J. Lawrie, for the Crown, stated the facts.

Lord Alverstone C. J.: The appellant has had a bad career. He has been persistently committing the same kind of offence. The longest sentence recorded against him before the sentence which is the subject of this appeal was a sentence of twelve months at the Stafford Sessions in 1907. The Chairman no doubt thought that the time had come to impose some longer term. There were thirteen convictions over a period of fourteen years. However, the last three of those convictions were not so close together as to lead one to think that the appellant could never do right. In the circumstances we think that it was not a case for penal servitude. The sentence will be reduced to imprisonment for eighteen months with hard labour, to date from the conviction.

Sentence reduced.

JOHN ALFRED BRADLEY.

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If there is a probability that the jury believed that consent was not a defence to a charge of rape the Court will quash the conviction.

This was an appeal against conviction by leave of Lawrance J., and an application for leave to appeal against sentence. Appellant was convicted on the 9th March, 1910, at the Leeds Assizes, of rape, and sentenced by Mr. Commissioner Scrutton, K.C., to penal servitude for three years.

Cuthbertson for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. In this case, the only issue for the jury was the issue of consent. The ground of appeal is that the verdict cannot be supported, and that there was a failure of direction amounting to misdirection. Appellant was twenty years of age, and the girl not quite seventeen. They were previously acquainted with one another. The girl's version of the affair was that the boy was leading a cart up a lane, and "he threw me on the bank-side and I struggled and shouted." She was examined by a doctor five days after the alleged rape, and,

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in his evidence, the doctor said that he found no mark or bruise of any kind on the girl, with the exception that her hymen was absent. He also said that, assuming the girl struggled violently, he would expect to find some marks or bruises on her body, even though five days had elapsed when he examined her. The girl was in the service of a Mrs. Thompson, and I objected to the terms of the complaint she made to Mrs. Thompson being given in evidence, as Mrs. Thompson was not called as a witness. I do not, however, rely upon that objection here.

[CHANNELL J.: She mentioned it to Mrs. Thompson only after Mrs. Thompson asked her why she was so long.]

"He turned me up," is all she said to Mrs. Thompson. The next day the girl made a complaint to her mother, who lived less than a mile away from Mrs. Thompson's house. The complaint to her mother was that one of the men had been pulling her about, and that something wrong had been done to her. She never said in terms or even by implication until she gave evidence before the magistrates that what was done was done against her will. The boy's evidence to a large extent did not contradict the case for the prosecution. He never denied the connection with the girl. He said the girl had been inviting him; that the ground was wet, and that they both slipped down together. The learned Commissioner never put this explanation to the jury in his summing up, merely suggesting that it was unlikely that the girl would consent to the prisoner having connection with her on a wet bank. Subsequently the boy went to Sheffield to seek employment. In summing up the case to the jury, the learned Commissioner said: "Judge for yourself the action of the prisoner in going to Sheffield for employment." It was wrong to suggest to the jury that the boy went away because of the alleged rape. He might have gone away, if he was ashamed of having done what was morally wrong, even though the wrong did not amount to rape. The burden of proving lack of consent was upon the Crown, and the learned Commissioner did not explain it to the jury in that way; and he put the case to them as if there was no doctrine of giving the benefit of the doubt to the prisoner. I submit that, on the evidence, the jury should not have found as they did.

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[CHANNELL J.: Was any evidence called as to the character of the prisoner?]

No such evidence was called, but the defence put his character in issue, and the prisoner was not cross-examined to character.

[CHANNELL J.: In summing up in a case of this kind, I should tell the jury that character is not of much importance.]

Jardine, for the Crown: The conviction is right. It was in mercy to the prisoner that the learned Commissioner disregarded the prisoner's statement that they slipped on to the wet bank by accident. He put the defence to the jury as being one purely of consent.

[BRAY J.: I should have thought that the girl would have gone straight home to her mother instead of to her mistress.]

It is impossible to lay down any general rule which girls would pursue under similar circumstances.

[BRAY J.: How do you account for the absence of bruises?]

The interval of five days before examination.

[LORD ALVERSTONE C. J.: Assuming she struggled, you would expect to find injuries.]

Unless she was paralysed by fright, as the doctor said.

Every point was put and properly put to the jury at the trial. This is really an attempt to re-try the case.

Cuthbertson (in reply): The girl was sent home by her mistress. All the trouble arose through the girl being found out. The girl's own evidence destroys any possibility of paralysis by fright.

LORD ALVERSTONE C. J.: This is an appeal against a conviction for rape at the Leeds Assizes. The case is one of extreme difficulty. This Court has had on previous occasions to

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point out that it cannot re-try cases upon issues which have been properly left to the jury. The jury in this case may have thought that the appellant had been guilty of the crime of rape because he used the expression "rape" in the sense of connection. From the beginning to the end of the case he admits connection, and says that the girl consented. Another incident of the case upon which it is more difficult to form a judgment is his suggestion that the girl invited him to have connection. The girl denied that. It is more difficult to come to a conclusion on that issue than on the main issue of the case. It was put as a difficulty against the appellant that he went away, but he may have thought that, as he did wrong, his conduct was bad; and that that was the motive or explanation of why he went away. The girl's story is that she struggled; but her clothes were not injured in any way, and there was not a trace of any bruise on her body. The doctor accounts for the absence of bruises differently. He says he would have expected to find bruises if she struggled violently, but he suggested that their absence might be accounted for by paralysis from fear. It would have been better in this case if it had been pointed out to the jury that there was no evidence of any such paralysis from fear. As to shouting, it is somewhat curious that she said her shouting was to the horse to go on. It seems to us that the jury may not altogether have appreciated the view that the appellant admitted he had connection, and that that admission, coupled with his going away, was capable of an explanation inconsistent with rape. It would have been more satisfactory if it had been explained to the jury that the onus of proof was upon the prosecution to shew that the girl had not consented. On the whole we think it safer that the conviction should not be allowed to stand. There was not sufficient evidence before the jury to justify them in concluding that the girl did not consent.

Conviction quashed.

JOHN CARPENTER AND HARRY LEWIS.

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John Carpenter and Harry Lewis.

Severity of sentence.

The appellants were jointly indicted at the last Glamorganshire Assizes at Cardiff before Lord Coleridge J. for larceny of three brass pieces for locking the vacuum piping attached to coal waggons. The prosecution confined their evidence to proving that the prisoners had stolen one of such brass pieces of the value of less than 25*s*. They were also convicted as habitual criminals, and sentenced to three years' penal servitude and to five years' detention. They appealed against both convictions and sentences.

Griffith Jones for the appellants (under s. 10 of the Criminal Appeal Act), who were not present, at the outset said that he did not propose to argue against the conviction of Carpenter for the larceny. He, however, wished to argue against Lewis's conviction for such offence. Dealing with Carpenter first, he submitted that the offence was a simple larceny unaccompanied by any aggravating circumstances such as violence, and that therefore three years' penal servitude was too severe, and that one could not escape from the conclusion that the severe sentence passed was with a view of bringing the Prevention of Crime Act, 1908, into play. He submitted that that was improper, and unfair to the prisoners. As to the previous convictions of Carpenter, they were eleven in number, but when analysed, they were not of a serious character. They had all been convictions of Courts of summary jurisdiction, and the sentences varied from two months' to four months' imprisonment with hard labour. One was for drunkenness, one for assault, one for being on enclosed premises with intent to commit a felony, and two for living on prostitution. The remaining six were for petty larcenies of articles of clothing, cigarettes, &c. The total sentences during the last eight years for larceny did not exceed eighteen months. There was the usual evidence of bad character. Counsel submitted that the offences in question were not such as were contemplated by the new Act. He contended that the Act was intended to apply only to grave offences such as robbery with violence, burglaries, coining, &c. Lastly, he pointed out that that Act applied its provisions to leading a dishonest life about the period that the primary offence charged

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was committed. Here Carpenter was discharged out of prison on the 12th July last, and he had been working, as was admitted by the prosecution, in August and September, and that therefore it could not be said that on the 7th January, when the larceny was committed, he was leading a dishonest life.

As to Lewis, counsel said that two of the previous sentences were for longer periods than in Carpenter's case, one being for twelve months and six months to run concurrently, and another for four years' penal servitude. Lewis was out on ticket-of-leave, and 344 days remained unexpired, and that if the recent sentences stood, he would have to serve nearly nine years, as the unexpired term of the four years would have to be added to the eight years appealed against.

Eustace Fulton for the Crown, was only called to argue in support of the sentences. He referred to the records of the appellants, and the general evidence of bad character, although in the case of Carpenter the previous sentences had been short.

CHANNELL J.: In this case the appeals against conviction come first. As regards Carpenter there was nothing arguable in his appeal against conviction. As to Lewis, he was with Carpenter when he had stolen property upon him, and they both ran away. Lewis was probably the worse of the two. The convictions of being habitual criminals were quite right. The only difficulty is as to the sentences, especially the sentence on Carpenter. It may be that the sentence of penal servitude was too severe, and would not have been given except with the object of making preventive detention apply. It may well be that the previous sentences were too light. The Legislature has said that when a person is convicted of leading the life of a habitual criminal he may be sentenced to preventive detention, but such sentence must be preceded by a term of at least three years' penal servitude. On the whole the Court does not think they ought to reduce the sentence of penal servitude, which would make the preventive detention inapplicable. As to Lewis, there were no grounds for disturbing the sentences, as he had had long sentences previously, and he (the judge) thought that he was the principal offender, and had induced Carpenter to carry the brass piece with the view of escaping punishment himself.

Appeals dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY, AND MR. JUSTICE PICKFORD.

KALMAN ETIENNE ALBRECHT.

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Kalman Etienne Albrecht.

On the trial of an indictment for being in possession of plates for the purpose of forgery, it is not misdirection to call attention to possession on dates before those specifically charged.

This was an appeal from an order of Mr. Justice Walton refusing leave to appeal against conviction and sentence. Appellant was convicted before Mr. Justice Bray at the Central Criminal Court on March 16th of having in his possession plates for the purpose of forgery. He was found guilty, after three days' trial, and sentenced to eighteen months' imprisonment with hard labour, and was recommended for deportation.

It appeared that appellant was indicted with another man named Peter under s. 19 of 24 & 25 Vict. c. 98 (the Forgery Act, 1861), for having in their possession on December 31st, 1909, and January 1st, 1910, without lawful authority or excuse, plates or materials upon which any foreign bill, note, or order, &c., shall be engraved or made.

Valetta for the appellant (under s. 10 of the Criminal Appeal Act), who was not present.

[LORD ALVERSTONE C. J.: The Court sees no reason why it should interfere with the decision of Mr. Justice Walton, but we will deal with the appeal upon a point of law, namely, misdirection, and extend the time of appeal for that purpose.]

The jury were misdirected inasmuch as the learned judge told them that although the prosecution alleged possession of the engraving plates on December 31st, 1909, and January 1st, 1910, they might find the prisoners guilty if they came to the conclusion

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that they had been in the possession of the plates before those dates.

[Lord Alverstone C. J.: If you had suggested at the trial that there was no possession on December 31st, 1909, and January 1st, 1910, that could have been remedied by amendment, but no objection was taken.]

The jury were in a great difficulty as to the date of possession. If they followed the direction of the learned judge and found that the prisoners were in possession before the dates charged, they were acting upon evidence which did not support the indictment. Peter was found by the jury to be the dupe of appellant, which was taken as a verdict of not guilty.

Lord Alverstone C. J.: In this case the appellant and a man named Peter were tried together on a charge of forgery. Information was given to the police about the appellant, and then, when both prisoners were arrested, they made charges against each other. At the trial the appellant had the assistance of counsel and solicitor, but it is now suggested that the jury were misdirected because the learned judge told the jury that if they found that the prisoners had been in possession of these plates at an earlier date than that charged in the indictment, they could convict. But it is straining the sense of one sentence to take it by itself unsupported by the rest of the summing up, and when one looks at the whole of the learned judge's remarks, it is clear that what he pointed out to the jury was that they were at liberty to look at the whole history of this case, and not bound to restrict their attention merely to the dates charged in the indictment. That seems to us to be the meaning of the summing up, and that being so, we do not think there was any misdirection.

Application dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY, AND MR. JUSTICE PICKFORD.

JACOB RICHMAN.

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Jacob Richman.

In sect. 13 (2) *of* 32 & 33 *Vict. c.* 62, *the Debtors Act*, 1869, "*transfer*" *includes a fictitious transfer.*

This was an appeal against conviction. The appellant was convicted before the Recorder at the Central Criminal Court on February 21st, after a trial lasting five days, of fraud in bankruptcy proceedings. He was found guilty; the sentence was postponed.

R. D. Muir (with him *Valetta*) for the appellant, who was on bail. Appellant was convicted upon five counts in an indictment of nineteen counts under s. 11 (1) and s. 13 (2) of the Debtors Act, 1869, charging him with fraudulent transfer and concealment of property. Counts one to six alleged fraudulent transfers of property on different dates; on one, two, five and six of these the appellant was acquitted. Counts three and four related to the transfer of a business, 160, Commercial Road, to the appellant's cousin, Asher Richman, on July 2nd, 1909. Upon these counts the appellant was convicted. Counts seven to twelve alleged destruction and mutilation of office books by fire, but the appellant was acquitted upon these; counts thirteen, fourteen and fifteen alleged concealment of 1,804 pairs of boots, charged to have been removed during the night, and count sixteen charged the appellant with non-disclosure of the same. Upon these counts, however, he was acquitted. Counts seventeen, eighteen, and nineteen alleged non-disclosure of part of his property, namely, boots delivered to him six or seven days before he stopped payment, and upon these counts

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he was convicted. The appellant's commercial history was given by the Trustee in Bankruptcy, Mr. Allen. He himself stated that he came to this country in 1889 with £10 in his pocket. He started business by selling boots from a barrow in the street, succeeding to such an extent that in 1904 he became a factor of boots, selling them to retail shops. A firm of boot manufacturers named Flatau gave him credit. Messrs. Flatau had in their service an accountant named Palmer, and when, in 1904, Messrs. Flatau wanted to know something about the appellant's financial position, they sent Palmer to make a balance sheet of the appellant's accounts, and this was done every year. In 1907 the appellant incurred bad debts. He thought it would be a good venture to open retail shops himself, and so avoid bad debts, and this he did in 1907—8. Matters did not improve, and in the beginning of 1908 he sold three of his retail shops—

(1) 77, Wentworth Street, to Harris Napper; June 10th, 1908.

(2) 160, Commercial Road, to Asher Richman; July 2nd, 1908.

(3) 20, Wentworth Street, to Harris Napper; August 12th, 1908.

In August, 1908, the appellant was in financial difficulties, and gave notice to his bankers not to honour any more bills, but to reserve his balance for his creditors. On August 20th, 1908, he called in Allen to take an inventory of his goods with a view to bankruptcy, and the same day gave notice that he had stopped payment. On August 21st the Official Receiver went into possession, and on September 8th, 1908, he was adjudicated bankrupt.

On August 7th, 1908, there was a fire on the appellant's business premises, in which his books were destroyed. Another inventory of goods was taken in September, with the result that there was a discrepancy of 1,804 pairs of boots between the two inventories. The suggestion of the prosecution was that these boots were secretly removed on August 20th. It should be remembered that the appellant was acquitted on this charge. The appellant was publicly examined in his bankruptcy, whilst Harris Napper and Asher Richman were privately examined. Proceedings were brought against both the latter by the Trustee in Bankruptcy, but subsequently abandoned on the ground that there was

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nothing in the estate wherewith to pay costs. No steps of a criminal nature were taken against the appellant until November, 1909, when it was found that he was carrying on business in two shops, formerly his own, as manager for his wife. The appellant's wife was the tenant, but because the appellant was seen in those shops, leave was asked to prosecute. When the case came to be tried, it was alleged that Harris Napper was not in a position to buy the two businesses which he did, and it was denied that the purchase money had passed. Napper, however, said that with regard to the first purchase, the money was paid off in account, and that with regard to 20, Wentworth Street, the money for it went into the appellant's account. So also did the money for 160, Commercial Road. With regard to this latter case, the prosecution alleged that the purchaser, Asher Richman, was a man of straw, earning a living by selling walking sticks in the gutter: that in July, 1908, he borrowed 15*s*. from a benefit society, and was repaying that sum by instalments of 6*d*. It was said that the money was not provided by Asher Richman at all. Evidence was given which shewed that the purchase money came from the account of a money-lender named Charkin, but the prosecution suggested that the appellant provided the money-lender with the money to lend to Asher Richman. This suggestion was based merely upon a statement made by the appellant in his public examination, when he said that in 1907 he had borrowed money from Charkin. Charkin was not called for the prosecution or defence, and the Trustee said he had made no enquiry of him. It was sought to prove that this statement of the appellant was untrue, because Palmer, the accountant, when balancing the appellant's books in 1908, said he was told nothing about a loan, and that when, in February, 1908, the appellant borrowed money from Messrs. Flatau, Palmer asked him if he owed any other money, and the appellant said he did not. That is the whole evidence upon which it is attempted to say that the appellant was owing no money to Charkin. Apart from that statement, the prosecution said that their case was affirmatively that the appellant gave the purchase money for 160, Commercial Road to Charkin, who handed it to Asher Richman. The Trustee in Bankruptcy who gave evidence admitted that there were other loans to the appellant about which he had made no enquiries, although the names and addresses of the persons con-

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cerned were given. With regard to one loan at least it was found that it was genuine, although no entry was found of it in any books. Yet it was argued that the money paid out of Charkin's account came from the appellant. Evidence was given by the girl who kept the appellant's books that one book was kept specially for entering loans therein. The secretary of the benefit society was called by the prosecution to prove that Asher Richman was in financial difficulties in 1908. The result of his evidence was that money in the nature of a bonus was due to Asher Richman, and the 15*s.* which he owed the society was a book debt, and not a cash advance. Evidence was given contradicting the suggestions made against Asher by the appellant, who stated that he knew Asher had borrowed the money wherewith to buy the business. The defence submitted that there could be no fraudulent transfer of the property unless Asher, the transferee, was a party to the deceit, as laid down in *In re Cranston, Ex parte Cranston*, 9 Morr. 160; 8 T. L. R. 504 (1892); Div. Ct. The learned Recorder said at the trial, "There is no evidence that I can point out to the jury to say that these two parties were parties to this fraud." If the property did not pass it was not within the section and was still the property of the bankrupt. No direction was given as to how the evidence of fraud bore upon the transfer, and the learned Recorder said nothing about the £400, the purchase money, or how Asher Richman got it. He practically put the case for the defence to the jury and said that they could convict on that case.

The conviction cannot stand, especially when one appreciates the fact that the appellant was acquitted on all the other counts connecting him with Harris Napper.

After his bankruptcy, a witness named Daniels did business at 160, Commercial Road with Asher Richman in the sale of rubber heels. Daniels in September, 1909, went to the shop to get an order; he saw Jacob Richman there, not Asher: he gave an order, and subsequently received a card with Asher's address, and was told to look to Asher for payment of the previous items. He received payment from Asher. The effect of Daniels's evidence was to shew that between the appellant's bankruptcy and October, 1909, the business was Asher's, not the appellant's business. The case for the Crown was that it was Jacob Richman's business all the time.

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As to the evidence of appellant and Cissie Corral on the first two counts, the appellant in his evidence says the lease of 160, Commercial Road was sold to Eleazar Napper for £150, £148 19*s.* 3*d.* of which (after deductions for charges) was paid into the bank; the business itself and the stock were sold to Asher Richman for £356 8*s.*, together with £65 for fixtures. A cheque for the full amount, £421 8*s.*, from Hind, the solicitor for the purchaser, was produced at the trial. Asher Richman had asked for time in order to get this money. The facts with regard to the money shewed that £200 of the price came out of Charkin's bank on 29th June, which sum was traced to Asher Richman through Mr. Hind. Mr. Hind's cheque was paid to Jacob Richman. The remainder of the sum necessary to make up £350, which figure it was suggested was very near that repaid to Marks by instalments by the appellant, is a sum of £150 paid by Marks (Charkin) drawn from his bank and paid into Asher Richman's bank fifteen days after the completion of the purchase. No payment out of Asher Richman's bank was traced to Jacob Richman. So that the £350 paid by the appellant to Marks in repayment of loans is made up of two sums, £200 and £150, and not one sum of £350.

The reason why two particular witnesses were not called was that it meant too great expense to the appellant. The three persons who knew all about the transaction were, however, called. It was for the prosecution to call the money-lender Charkin if the money was borrowed from him. It is not merely that money came from Charkin, but through him from the appellant. Charkin is either their witness or their prisoner. It is not for the defence to make out a case; mere suggestion and suspicion are not enough to throw on the defence onus of calling a witness.

[Bray J.: I agree you cannot make out that not calling a witness is tantamount to evidence for the prosecution; but you say there is no evidence that Charkin received it from the appellant.]

The appellant, in his public examination, said: "I paid Charkin a certain sum amounting altogether to £349," and the suggestion is that that is the same money

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[Pickford J.: Was it contended that if you were to assume this money was borrowed by Asher Richman and did not come from the appellant, that then the sale was fraudulent? The Recorder never seems to have put to the jury whether this money was found by Jacob Richman or not.]

If that was the state of facts there is no fraud. Whether the jury believed the money was found by appellant for Asher Richman or not, the Recorder assumes it was borrowed from Charkin.

With regard to the wife of the appellant taking 160, Commercial Road, the appellant had gone out of possession. The prosecution suggested that he was found in possession, which under the circumstances shewed a sham transfer. The evidence shewed that the wife suggested she would find £100 in cash, and the rest in bills at three months. The only evidence as to Asher Richman's position was that he was a stick dealer in Crispin Street. The evidence went to shew that he was a general dealer.

With regard to loans which were obtained from several different persons, which were received in cash, paid into the bank, and entered in the pass book, the Trustee in Bankruptcy said that the names and addresses of the lenders were given, and that no enquiry was made of those persons to test the genuineness of the loans. The trustee could not say whether they were identified in the pass-book. The appellant again and again challenged the prosecution to produce the pass book. Moreover, Cissie Corral's evidence establishes that she handled both the money and the bills given by appellant for the loans.

As to counts seventeen, eighteen, and nineteen (viz., Brown's, Hawkins's and Roberts's goods), it is submitted—

(1) That evidence was improperly admitted, in spite of objection, and that the evidence so admitted was not relevant to any of the counts in the indictment.

(2) That there was no evidence that the goods were disposed of otherwise than in the ordinary way of trade. The broad ground is that not a single pair of boots of the particular kind was traced.

(3) That there was no evidence of non-disclosure of assets. The broad ground of this submission is that the trustee said he could not say that the goods in question were not

included in the cash sales amounting to £4,544, which money did not go into the bank.

(4) That there was misdirection in point of law; because the only direction in point of law was where the learned judge told the jury it was the appellant's duty to make a clean breast of it.

There was a suggestion to the jury that the appellant was obtaining credit by false pretences or other fraud, within the Debtors Act, 1869, s. 13. There was no such charge against him. Evidence of general dishonesty was put as if it were evidence of cheating his creditors in regard to charges in the indictment. Neither as to the corrupt sale nor the destruction of books, nor as to the making away with his stock, were the questions put proper. Further, the prosecution suggested that the appellant was defrauding certain persons who were called as witnesses, and the Recorder admitted as evidence, viz., questions as to whether they knew the appellant was disposing of his retail shops at the time they supplied goods.

[The Lord Chief Justice: It may have led the jury to mistrust him generally.]

The learned Recorder put it to the jury: "Then there is this question upon which Mr. Muir raised the point of law as to whether it could be properly put to the witness, 'Did you know that in June, July, and August he was disposing of these three retail shops?' Mr. Muir objected that the question was irrelevant. It appeared to me to be a thing which I could not exclude, but I agree with Mr. Muir that it is not very important to the case, and I should advise you to dismiss the answer to it entirely from your recollection, and to act upon the evidence quite apart from the answer given to that question, because it really does not affect the question one way or the other." The evidence ought never to have been admitted. It is too late to say the question is of no importance when the judge has over and over again admitted it as proper evidence.

There is no evidence that the goods were disposed of otherwise than in the ordinary way of trade The sole evidence on the point is that of the Trustee in Bankruptcy. The elements of the offences under the Debtors Act, 1869, s. 11 (1), are (i) that the defendant has disposed of his goods; (ii) that he has not dis-

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closed to his trustee how and to whom and for what consideration he has disposed of them; (iii) that the goods were disposed of otherwise than in the ordinary way of trade.

The goods were disposed of in the ordinary way of trade. They were included in the goods which were sold for £4,544 in cash. That amount cannot be divided at all. Palmer, the accountant, proved that the books were very badly kept: the appellant is an illiterate man.

Bodkin, for the Crown. The cash account dates were not accepted as true.

[Bray J.: But the prosecution was founded on this cash account.]

Many of the relevant entries were burnt in the fire. The jury acquitted the appellant so far as any inference from the fire is concerned.

The only evidence as to what became of the goods was that of Zetta, Coral, and the appellant, and their evidence all shewed an ordinary disposition in the way of trade.

[The Lord Chief Justice: Having regard to the short time before the bankruptcy that the appellant bought goods to a large amount, it may be that the jury did act upon that evidence.]

Then it is against the weight of evidence.

[Bray J.: If the ordinary sales amounted to about £300 in a week, sales to the extent of £1,000 do not appear to be in the ordinary course of trade.]

There must be affirmative evidence to the contrary.

[Pickford J.: Would money taken for them appear in the cash book?]

The goods were sold quickly. There was a cash book in which the sales would have been entered. It was not in the book destroyed by fire, for that was before the goods were sold.

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[PICKFORD J.: Then they should have been in the new cash book.]

The learned Recorder in summing up referred to the evidence of Palmer, the accountant, in connection with the last three counts of the indictment (as to non-disclosure). Palmer's evidence is irrelevant. It is true that the boots of Mr. Hawkins were disposed of very quickly, but they were in great demand in consequence of the proximity of the Jewish festival.

The jury ought to have been directed as to what the evidence was and what it was not as to the question of non-disclosure, and not directed to answer whether mere non-disclosure could be said to be evidence of disposal otherwise than in the way of trade.

Bodkin (*Graham Campbell* with him), for the Crown. I submit that in such a case as this, where there was a good jury, a summing up full of figures is not defective merely because it does not refer in detail to the whole of the evidence. The prosecution was opened in considerable detail to the jury, and various sections of the Act of 1869 called to their attention. The matter was also dealt with in reply, and by Mr. Muir, with clearness, and there is no doubt but that the jury having followed and discriminated it all, thoroughly understood what the issues were. It was not necessary for the Recorder to discuss all the details of the five days' trial. The judgment in *Stoddart's case* (1909) should be considered, 2 Cr. App. R. 217, at pp. 245, 246. [Counsel read part of the judgment.] Channell J.'s written judgment is in point in *Cohen and Bateman*, 2 Cr. App. R. 207—8 (1909). On the principles of those cases there is no part of the learned Recorder's summing up that has effected a miscarriage of justice.

What is the law here? It is governed by sect. 13 (2), Debtors Act, 1869. The jury could not fail to appreciate what a transfer is or what a transfer within that section is; and the Recorder said it must be a transfer with intent to defraud. The jury could not fail to see that the real question was whether Richman's transfer of 160, Commercial Road was made for the purpose of defrauding creditors, to give a cloak to the real state of affairs, which was, that after the stormy time in July had been passed, the appellant might go back to these businesses. Such a view

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put to the jury could not militate against the principles in the two cases cited. The Recorder could not have put the issues on the counts dealing with these transfers more clearly than he did.

[Bray J.: Could he not have asked "Did this money come from Jacob Richman himself; was it a real transfer?"]

I submit, it is no misdirection to omit to point out the way in which the fiction was carried out. The words of s. 13 (2) of the Debtors Act, 1869, are: "gift, delivery or transfer of . . . . his property." Delivery is the essence of the offence. There may be a transfer within the Act, though no transfer as against creditors.

[Bray J.: Yes, that is the law.]

Cranston's case is immaterial, for Asher Richman and Charkin must have been parties to the transaction.

The Recorder was right in saying that if appellant did not discover the property he obtained on credit, he might not be able to satisfy the jury that he had no intent to defraud.

[Bray J.: Were they disposed of in the ordinary way of trade? That is the whole question. Might the Recorder have misled the jury into supposing the question was "Did he discover?"]

The summing up is against that being a possible construction.

The transfer of 160, Commercial Road was fraudulent although the trustee dropped the actions against Napper and Asher Richman. The trustee fully explained that in his evidence. The jury were justified in discriminating between Napper and Asher Richman, for Napper did, in fact, pay by instalments and was doing a business to the appellant's knowledge. No doubt it was alleged that Asher Richman had a stick trade; but that was only supported by the evidence of the appellant. He could have come as a witness.

Asher's position as to the Benefit Society and his borrowing from Charkin truly shewed the nature of the transaction. Asher Richman was borrowing from the same man whom the appellant had said had lent him (Jacob) money the previous year. The

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appellant never ceased to occupy 160, Commercial Road although he sold the lease and the stock. The name remains up on the premises.

As to loans—contrary to appellant's assertions, Palmer, the accountant, swore he knew nothing of the loans. The jury disbelieved the appellant.

As to bills. Why was not Charkin called to say how the loans repaid to him and included in the £4,544 alleged cash sales were repaid? Charkin was bail for appellant and son-in-law of Asher Richman.

As to the goods not fully and truly discovered—it is sufficient to say that the goods have not been traced, and that the receipts were not entered up at so critical a time, *e.g.*, there is no entry as to the sale to Soper for £125 of some of the boots in question.

[Bray J.: Why did not the official receiver get at all this earlier? It was perfectly easy to find out what became of all these goods. Why were not enquiries made from Cissie Corral and Zetta?]

That ought not to affect the question before the jury. Besides, the appellant should have disclosed.

[Bray J.: It is not a question of non-disclosure. It is a question of disposal not in the ordinary way of trade.]

There were no payments to cash account after August 11th. Nothing was paid into bank after the goods came to the warehouse. Moreover, if the appellant particularises between August 14th and 31st, why does not he specify the sale of these particular goods as between 15th and 18th August when he gave notice that he was not going to meet his bills at the bank?

Further, there was evidence by the vendors that they did not know of the change in the character of the defendant's business, viz., from wholesale to retail. The circumstances generally in which the goods were bought might supply the very motive for not disclosing to the trustee; not disclosing the change in the business was relevant on the question of non-discovery of assets. Might not the jury look at £4,544 cash for goods sold and not

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a penny of it in the bank? The jury rejected what they ought to reject. Therefore there was no miscarriage of justice.

Muir, in reply. The attitude of the trustee is that of the prosecution, which is to make no inquiry and leave it to the appellant to get out of his difficulty. The jury ought to have had substantial definite evidence, and the Recorder ought to have weighed it. Whereas in this case there was other evidence in their heads prejudicing their minds for days.

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Pickford J.: This is an appeal from a conviction at the Central Criminal Court for two offences, in substance, under the Debtors Act, 1869. There were a considerable number of counts, and on some of them the defendant was acquitted either by direction of the learned Recorder or by the jury. But upon two separate sets of counts he was convicted. Counts three and four alleged a fraudulent or collusive or bogus transfer or delivery of the stock and business in 160, Commercial Road to Asher Richman, who was a cousin of the defendant. The other set of counts were seventeen, eighteen, and nineteen, which alleged offences under sect. 11 (1) of the Debtors Act, 1869. That in substance amounted to this: that having disposed of goods not in the ordinary way of his trade, he did not disclose to the trustee how and to whom he had disposed of them, and if it were established that he had so disposed of them, or there was evidence on which the jury could find so, it could not be contended there was a proper disclosure. But it was objected that there was not any evidence or, if any, not sufficient to support the conviction of the jury upon these sets of counts. There was a very long trial, a great deal of evidence, and a great many matters discussed in the Court below, and it is not necessary to go into all the matters discussed. The defendant, according to the evidence of an accountant, at the beginning of the year 1908, was solvent, and had a considerable surplus of assets. He was asked at or soon after the time the balance sheet was made whether there were any liabilities outside the books, on the making up of the accounts, and, accouting to the evidence of the accountant, he said " No." By July or August of the same year he was hopelessly insolvent. There was a large excess of liabilities. About the time he was

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shewn to be in this state, for some reason or other he found it convenient to part with the retail shops. He had had a wholesale business and retail premises, and about this time he disposed of three retail places. The only one with which we are concerned is 160, Commercial Road, which was transferred to Asher Richman. Now there was evidence, we need not go into it in detail, but there was evidence that Asher Richman was an impecunious person. There was evidence that some of the money which was paid in respect of this transfer or handed over, had been obtained from Marks Charkin (a tobacconist and money-lender, and also a relation of the defendant) a short time before, and that about this time the appellant had been paying money to Marks which he said was in repayment of loans.

These loans were entirely denied to the accountant by the defendant. He said there were none. If there were such loans, some evidence should have been in existence (I mean documentary evidence), because it was said that bills or documents relating to them were upon the premises. None were found. The lease was disposed of to another man (also a relation), and the defendant remained in the house for some considerable time, and about a year after he was again in possession. The place was now carried on by his wife. These facts are evidence that this was a delivery and a bogus delivery or transfer, and that the business was not genuinely transferred to Asher Richman. Now that evidence being in existence, the defendant had open to him one of two courses: either he could rely on the weakness of the evidence and ask the jury not to believe it, or he could give evidence himself and call witnesses to disprove the evidence for the prosecution. He chose the latter course; he gave evidence himself and called other witnesses, and the result was that the jury did not believe him. The two persons, Asher Richman and Marks Charkin, were not called at all in respect of this matter. The prosecution alleged they were parties to this fraud, and therefore that it was not likely the prosecution would call them. They were not the prosecution's witnesses except in the sense that, if without their evidence there was not sufficient proof of the offence, the prosecution would fail. But in our opinion there was other evidence fit to be left to the jury, and when defendant elected to dispose of this evidence, Asher Richman and Marks Charkin became important witnesses, who would naturally be called by the defen-

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dant in support of his case. The jury were entitled to take into consideration the evidence given on the one side and on the other, and if they did take into consideration the fact that these two witnesses were not called, they were entitled to do so. There was matter proper for the jury's consideration, viz., whether, looking at the way the witnesses gave their evidence, they considered it proper to rely on the evidence given. The jury came to the conclusion that the prosecution had proved the charges, and it is not possible for us to say that that verdict was so wrong and contrary to the evidence that we can set it aside. With regard to the conviction on counts seventeen, eighteen, and nineteen, it was necessary to shew that the goods had been disposed of not in the ordinary course of trade. The evidence as to the general financial position of the defendant at the beginning and middle of 1908 is admissible evidence on this charge. These goods were supplied within a very short time of the bankruptcy (within a day or two of the act of bankruptcy). Afterwards, no substantial part of the goods were found on the premises. They had been disposed of in about a week. The amount supplied by the dealers was about equal to the weekly turnover of the whole of the defendant's business. Thus an exceptional amount was disposed of in a very short time. There was evidence, too, that the money was not accounted for in the ordinary way in which it is accounted for in business books. It was said they had been disposed of for cash, and that therefore they would not appear in the credit books, nor in the bank books, because the money was not paid there. But invoices and entries in some books or other ought to have been in existence, and it was said that some such books or documents existed. None, however, were found, when the documents were taken possession of by the Trustee in Bankruptcy. At first the contention was raised that these goods were in fact on the premises, and had not been properly looked for by those who supplied them, and who came to look for them. But there was evidence for the jury that a sufficient search had been made; moreover, that was not really the answer set up to the jury nor before us. These facts were *primâ facie* evidence for the jury that these goods had not been disposed of in the ordinary course of trade. Again, the defendant chose to answer that evidence by giving evidence himself and by calling witnesses to displace it. They were witnesses the jury might believe, but they did not. They came to

the conclusion that their evidence did not dispose of the evidence for the prosecution. We cannot say their finding was so wrong that we ought to set it aside.

In addition, the learned Recorder is said to have (1) misdirected the jury in law, and (2) misled them by not sufficiently indicating what they had to try. As to (1), in our opinion the learned Recorder told them to inquire whether the transfer was bogus or not, and that *was* what they had to try. He did not direct them how the money lent to the defendant was obtained by Charkin, because he thought it unimportant. He merely omitted an element of evidence that had been used by the prosecution. As to (2), it is complained that he referred on two separate occasions to the question of the goods not having been disposed of in the ordinary way of trade. At the end of the summing up, after saying that, he went on to say, "If you think the prosecution have established—it is for them to make out the case against the prisoner—that these goods were not disposed of in the ordinary course of his trade, in that case you ought to convict him on these counts. . . . . It is his duty to truly discover how and to whom, and so on—in the very words of the section to which I have more than once referred—these goods were disposed of, and if you think he has not done so, it is your duty to say he is guilty on those counts of the indictment." Now, if before saying "in that case" he had said "in case you find that he did not dispose, &c.," it would have been verbally more correct, but in our opinion there was no misdirection; the jury could not have been misled. There was another objection to the summing up: that it was so misleading that the jury had not proper indications as to what it was they had to try. A summing up may, without misdirection, be so misleading as to cause a jury to go wrong. Now in these cases of fraud, where complicated evidence is adduced, and the case extends over a considerable time, we think it would be more satisfactory if the jury were directed to the issues, and the substance of the evidence bearing on the issues, more definitely than they were in this case. But we do not think there was any sufficient omission, or misstatement of evidence or of issues for us to form any objection, or to bring this case within the principle in *Cohen* and *Bateman* [above, p. 241]. Therefore we do not think the summing up is open to objection or such as to justify us in interfering.

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There is one other matter. It was objected that evidence was wrongly admitted, viz., of persons who supplied goods, and who were asked if they would have supplied them had they known the defendant had disposed of 160, Commercial Road. They said "No." The evidence was admitted by the learned Recorder. It ought not to have been admitted; it was not relevant to any issue; its only effect would be to shew some improper or dishonest conduct not relating to the issues for the jury. But the question is whether in consequence of its admission, this conviction ought to be set aside. The learned Recorder, in summing up, told the jury that they ought not to pay any attention to that evidence, although he thought it ought to be admitted He was right in saying they ought to pay no attention to it. We must say whether there was any miscarriage of justice owing to its admission. We think not. The course and result of the case shewed that the jury did not arrive at their verdict on any grounds of prejudice, but that they had carefully discriminated. We do not think there was any miscarriage of justice, and that therefore that objection also fails. We think, therefore, that the appeal should be dismissed, and the conviction must stand.

Appeal dismissed.

Solicitors for the Appellant: *Osborn and Osborn.*

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JOHN LAITWOOD.

The fact that a final step still remains to be taken to consummate an attempt to obtain by false pretences does not prevent the acts done amounting to such an attempt, if those acts would have culminated in the full offence if accused had not been interrupted.

This was an appeal against conviction on 4th April, 1910, at the Cheshire Quarter Sessions for attempting to obtain money by false pretences. There was no appeal against the sentence of twelve months' imprisonment with hard labour.

Artemus Jones for the appellant, who was not present.

There were two counts: one for attempting to obtain £100

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from one Slater, the other for attempting to obtain £100 from one Ingham. The submission to the Court is that the appellant had not attempted to obtain money at all, that there was no evidence that he had so attempted, and that both Ingham and Slater admitted he had made no attempt to get money from them.

Appellant made the statements, the subject of the indictment, in answer to advertisements inserted by Ingham. Appellant had carried on business as an advertisement canvasser several years ago, and whilst doing so had prepared a balance sheet shewing the amount of business he had carried through. Appellant went to see Ingham on or about February 15th, and said he was going to form a company, and further stated that there would be an excellent opening or two for a young man of tact and ability, and that he would be able to earn from five to six hundred a year. Appellant also stated that he did business with Bates & Co., sending orders through them. Since 1896 he had done no business with them. But that firm admitted that they would have sent on anything he might have sent them. The balance sheet shewed he had obtained ten per cent. on advertisements he brought from the *Manchester Guardian* and fifteen per cent. from the *Manchester Courier*. Apart from this, there was no evidence that the appellant made representations as to percentages. He said also that they, meaning his firm, Laitwood & Co. (a mere style), were making £5,000 a year, but he did not say that with reference to the previous year of business. The balance sheet did not refer to recent times at all. The appeal is not based on the ground that there was no falsity, but on the ground that the appellant did not attempt to get £100 from the two men. The appellant further stated that the applicant for a situation would have to invest £100 in the company in debentures. But when asked whether the appellant made any attempt to get this money, the witness Slater, to whom appellant made substantially similar representations, replied, "Only in that way," meaning that appellant had tried to induce him by saying he was about to register a company. To Ingham, the appellant said the applicant must take up £100 in preference shares. When asked, "As far as you personally were concerned, he made no attempt to get £100 from you?" he replied, "No, sir."

Moreover, the prosecution tried to get in evidence of false pretences not alleged. Papers were found on the appellant, and the

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fictitious style of "Laitwood & Co." appeared on some of them, and also documents purporting to shew that they, the "company," were doing business with Bates & Co. There was no ground for saying that Laitwood had failed in business, for there was no evidence of this. There was no evidence of the offence charged. The police struck too soon. The attempt could only begin when the series of acts culminating in the crime had reached the point when the appellant told them that they had been appointed to the situations. They were never apprised of this. The omission of this step is fatal to the contention of the prosecution. *Cheeseman,* Leigh and Cave's Crown Cases 145; 31 L. J. M. C. 89; 8 Jur. N. S. 143; 5 L. T. 717; 9 Cox C. C. 100 (1862), *per* Blackburn J.

[Pickford J.: Suppose he told them they were appointed? Or suppose he tries to get them to apply for the situation?]

Still it is mere preparation. He is merely, to use a sporting metaphor, groundbaiting the swim. He has not yet begun to fish. If he does nothing but put the ground bait in, he cannot commit the illegal act of catching the fish.

The same point was taken in *Roberts,* Dears. C. C. at 550; 25 L. J. M. C. 17; 1 Jur. N. S. 1094; 7 Cox C. C. 39 (1855). The distinction made by Jervis C. J. between initial preparation and attempt is in point.

[Pickford J.: In Stephen's Digest of Criminal Law, Art. 50, I find two illustrations: (a) If A. procures dies for the purpose of coining bad money, A. has attempted to coin bad money; (b) A. goes to Birmingham to buy dies to make bad money; A. has not attempted to make bad money. Is not the first example rather against you?]

No; it goes further.

[Pickford J.: If he buys the dies, that is very like baiting the swim, is it not?]

There remained other steps: for instance, applications for situation, or a statement that the appointments were filled by them.

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Trevor Lloyd, for the Crown. The effect was the same as if words were actually spoken indicating that they were asked for the money. It depends on the purpose. Appellant procures a balance sheet; for what purpose if not to procure £100?

[BRAY J.: Suppose a man says, "Come and see these goods of mine, which are worth £100," but goes no further.]

That is an attempt if the goods were not worth £100 to his knowledge. The promise of an appointment would be merely another false pretence.

[BRAY J.: If he had said, "Now you are appointed give me the £100," there would be no doubt about it.

PICKFORD J.: Here is another definition, Archbold, p. 1296, the Draft Code definition: "An act done or omitted with intent to commit that offence forming part of a series of acts or omissions which would have constituted the offence if such series of acts or omissions had not been interrupted either by the voluntary determination of the offender not to complete the offence or by some other cause."]

That applies. The case of *Crab*, 11 Cox C. C. 85; 18 L. T. 370; 16 W. R. 732 (1868); C. C. R., is in point. That was a case of the full offence, but only because the money was actually deposited.

Artemus Jones, in reply: Blackburn's judgment in *Cheeseman* shews the difference. "There is no doubt a difference between the preparation antecedent to an offence and the actual attempt. But, if the actual transaction has commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime."

Moreover, Slater stated distinctly he knew if he paid the money it would go into the coffers of the company, and not into the appellant's pocket. If there is no case on the evidence as to Slater and Ingham, there is no case at all. You cannot read into the words uttered a meaning which is not there at all. Slater had not even made up his mind to apply at this point: he shews it in evidence.

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[BRAY J.: That merely shews that up to that time the appellant had not got them to apply.]

Before places were available for the two men an antecedent step had to be taken, namely, the formation of the company. The false pretence must not be too remote.

PICKFORD J.: This case is not free from difficulty. It is very near the line, but on the whole we think the conviction ought not to be disturbed. It was a conviction on two counts for attempting to obtain money by false pretences, and for the purposes of the argument it is not denied that the representations were false. The question was whether what the appellant said or did amounted to an attempt. Appellant went to two different people, made false representations as to his business being flourishing, and tried to get them to apply for situations under or in that business, telling them they would have to invest £100 either in debentures or preference shares. They did not apply, and were not asked directly to supply the £100. But what was he making these representations for? They were not mere preparation. He must have made them to get the hundred pounds. No doubt an intermediate step, viz., application for the situation which these people were seeking, was necessary. But adopting the definition suggested of an attempt which is practically the same as that given in Stephen's Digest, there was here an act done in order to commit an offence which formed part of a series which would have constituted the offence if not interrupted; therefore we think there was here an attempt, and the conviction ought to stand.

There is a point which has not been raised, viz., as to the punishment. It is quite clear here that hard labour cannot be given. Therefore that part of the sentence must be quashed.

Sentence of hard labour quashed.

FRANK PALM (a).

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On the trial of an indictment under sect. 58 of 24 & 25 Vict. c. 100, the Offences against the Person Act, 1861, for administering "a noxious thing to the jurors unknown," evidence of the nature of a noxious thing administered after the date charged in the indictment, but containing a common ingredient with that charged, is admissible to prove the nature of that administered on the earlier date.

Where there has been a series of attempts to procure abortion, evidence of these is admissible to prove that a drug administered on a certain occasion was administered with that intent.

Dorsett for the appellant, who was present. The date of the offence was 17th May. There were several other indictments, one charging appellant with a similar offence on a subsequent date. On 31st May appellant gave the deceased a bottle. The evidence of the contents of this bottle ought not to have been admitted. The contents of this later bottle could not possibly be explanatory of what was administered on 17th May. The deceased girl, who died of puerperal fever, said the bottle delivered on 17th May contained pennyroyal, but her story was not corroborated. There was nothing whatever to identify what was in the bottle given on 17th May. The prosecution proposed to put in as evidence an analysis of what was administered on the later date. This could not be evidence, and even if admissible it was only material as to intent. Moreover, it was in itself a felony, and the subject of another indictment.

The summing up contains misdirections. The defence was put to the jury very generally, but the judge gave the prosecution's case specifically. The essentials of the offence were not present here. The essentials are that the thing must be noxious, besides being administered with intent. It is submitted that there was no evidence of noxiousness.

[Bray J.: But the girl's deposition shews it was. She says, "It had a strong bitter taste. Each time I had it, it gave me pain in the stomach and made me sick." Is that not evidence?]

(a) See p. 201 above.

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It is submitted that the mere fact it causes pain and inconvenience does not make it noxious. Noxious is to be understood with reference to the preceding words in the section (24 & 25 Vict. c. 100, s. 58), "any poison or other noxious thing."

[Bray J.: But there is something further. In cross-examination it is elicited that there was pennyroyal left over from the first bottle. Suppose there is evidence that pennyroyal is noxious?]

The doctor's evidence was inconclusive. He said he could not tell whether the thing was pennyroyal or peppermint. The evidence shewed that the dose was nothing more than an ordinary dose, and innoxious. Thirty-eight grains are a very small dose, and that would act merely as a slight purgative. The judge did not deal with that analysis at all. It ought to have been put to the jury to answer whether what was found in the bottle on 17th May was noxious.

The girl died in the middle of January after giving birth to a fully grown child. The inquest shewed that she died from ordinary puerperal fever. No drug that the appellant administered affected death in the slightest degree; nor did he administer any after the girl discovered her condition. The sentence was excessive. I did not call the appellant because there was a desire not to reflect on the girl. Death could not be traced to anything appellant gave her. A severe purgative might well bring on child labour.

R. A. Willes, for the Crown, was not called upon.

Bray J.: This is an appeal against conviction for having administered noxious drugs on 17th May, with intent to procure miscarriage. There were several counts. The first two relate to pennyroyal; counts three and four to a noxious drug unknown. The first objection is that evidence was wrongly admitted as to the analysis of a drug on 31st May. On 17th May the appellant gave her a drug. It is not clear what the drug was. Evidence was given that on 31st May he gave the girl a drug which on analysis turned out to be pennyroyal. It seems to us that this evidence was rightly administered on two grounds: first, to shew

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that the drug administered on the 17th was "a noxious thing" and the same as that administered on 31st May. The girl described it as having a bitter taste, and being of dark brown appearance; she also said that on May 17th he brought a bottle labelled "pennyroyal," and put some of it into the mixture on the 17th; and she further said he put the rest of the pennyroyal into the bottle on the 31st, so that the pennyroyal was, according to her evidence, a common ingredient of both mixtures, and the contents of the mixture given her on the 31st, which also had a strong bitter taste and was of a dark brown colour, was proved, when analysed, to contain pennyroyal. Secondly, it was evidence of the intent. These were a series of acts, and you merely look at them all to see what the intent was. The next objection was that it did not appear that what was given on the 17th was a noxious thing. But her deposition shewed that the first mixture contained pennyroyal, and the analyst's evidence was to the effect that pennyroyal may cause miscarriage, and that the second mixture was a strong purgative, and that might cause straining and procure abortion.

The third objection was that the case for the defence was left too generally in the direction to the jury. But the judge only directed them as to evidence relevant to what took place on the 17th.

As to the sentence, we do not think it was unduly heavy. It may run from the date of conviction.

Appeal dismissed.

Solicitors for the Appellant—*Philip Baker & Co., Birmingham.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY AND MR. JUSTICE PICKFORD.

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The completion of one of a series of acts intended to result in killing is an attempt to murder, even though to consummate the murder other acts must follow.

An attempt to murder found under sect. 9 of 14 *&* 15 *Vict. c.* 100, *the Common Law Procedure Act*, 1851, *is within sects.* 11–15 *of* 24 *&* 25 *Vict. c.* 100, *the Offences against the Person Act*, 1961. *That statute is not affected by* Connell's *case* (6 *Cox C. C.* 178; 1853).

An act done with intent to murder is an attempt to murder. The dictum of Kennedy J. to the contrary effect in Linnoker (1906, 2 *K. B. at* 103) *disapproved.*

This was an appeal against conviction on grounds of law.

Appellant was convicted at the Birmingham Assizes on March 16th, 1910, of an attempt to murder under 24 & 25 Vict. c. 100, s. 11, on an indictment for murder, and was sentenced by Darling J. to penal servitude for life.

S. 11 runs: "Whosoever shall administer to or cause to be administered to or to be taken by any person any poison or other destructive thing . . . . with intent . . . . to commit murder shall be guilty of felony and being convicted thereof shall be liable . . . . to be kept in pexal servitude for life. . . ."

Maddocks for the appellant, who was not present. The facts are not in dispute; the contention is as to what inference can properly be drawn from them. The deceased woman lived in Coventry. She was seventy-five years of age. Appellant was her only child. He had been out of work. The mother was possessed of small means and an old age pension. She used to allow the appellant five shillings a week, and ten shillings while out of work. She was not in good health. She had had a severe illness a year before her death. She was taking medicine up to time of

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death. In November, 1909, she was ill in bed. It was admitted that prisoner attended his mother and acted as her nurse. She saw the doctor twice in November, and appellant visited regularly. Evidence was given by prosecution that she was taken ill on Christmas Eve; that the appellant was there that day; that one of the witnesses gave her an emetic, and that she then seemed better. After December she was apparently much better, and she and the appellant were on good terms. The regular visits continued. On 9th January, which was a Sunday, and the day of the alleged attempt to murder, the deceased woman went to a shop and bought some ginger-beer. She said at the shop that she was expecting her son to come, which he did. At 9.30 p.m. a neighbour went into the house of the deceased and found her on the sofa dead. Opposite her was a table, on the table a glass containing a mixture or solution of cyanide of potassium. There were only two grains in the glass. Had she taken it, it would not have killed her. Five grains is the minimum dose that will prove fatal. The glass was three parts full. There was no evidence as to whether any had been taken. A spoon was there, and a white powder also, but the presence of this powder, which was tartaric acid, formed no part of the case. Deceased would seem to have had a taste for this kind of powder. There were five other similar packets found in the house. At her feet was a tin bowl. There were no indications that a struggle had taken place; no evidence of sickness or illness, nor any marks of violence; no signs of fit or fright nor anything to suggest that she had come by her death by other than natural causes. A messenger was dispatched for the appellant, who lived the other side of Coventry. When told his mother was dead, he said, "Oh, dear," and fell down. One witness said, "I considered it entirely pretence on his part." This evidence was inadmissible. When he arrived there, Dr. Lowman was there, together with a serjeant of police. A conversation ensued. The doctor said, "Your mother has taken something." The appellant replied, after smelling the contents of the glass, "Why, it's cyanide of potassium." Asked how he knew, he replied, "I use it for hardening tools." Apparently that excited no suspicion.

They then repaired upstairs and examined boxes and cupboards. Appellant said, "I came here this afternoon, lighted a fire, and

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put a hot water bottle in the bed." A search for his mother's belongings being made, everything was found in order, and it was also found that the appellant spoke the truth as to lighting a fire and putting hot water in the bed. A neighbour then assisted in carrying the body into another room. That neighbour said in evidence that she smelt a strong smell. The judge ordered a test in Court of this alleged odoriferousness of cyanide of potassium, and an expert witness said such a smell would be expected. But the evidence was irrelevant, for when asked, the witness who had alleged the existence of a strong smell, said the smell produced by the test in Court was not the same smell at all. Apart from that, there was no evidence at all that the poison had been taken, nor did the verdict go on that ground. On the following day the appellant voluntarily went to Dr. Lowman and said, "Doctor, I ought to say I bought some cyanide of potassium at a chemist's, Bird, of Coventry, and mother must have got hold of it. I used it to harden tools." The prosecution alleged that cyanide of potassium would not harden tools. In summing up, the judge pointed out quite rightly that whether it did or did not harden tools, the workmen of Coventry believed it did, and chemists sold it for that purpose. On 12th January there was a post mortem examination by Drs. Lowman and Phillips to ascertain whether there were any traces of cyanide of potassium. The stomach was taken, sealed, and sent to an analyst. The analysis threw no light on cause of death. The blood on the coating of the stomach found by one doctor was satisfactorily explained. There was no evidence to shew that any trace of vapour was given off; none was found in the jar containing the stomach; so that the theory that cyanide being a volatile poison, and that all traces would have evaporated, has no bearing on the facts of this case. The post mortem did not disclose any cause of death. One doctor said the death might be due to an epileptic fit, but there was no evidence of such a cause. Natural causes were evidence of fright or anything else. The operation of cyanide of potassium causes convulsions and instantaneous death. But it is too late for the prosecution to suggest that she took the cyanide. Dr. Lowman gave as the probable cause of death, "fright or some other external cause."

On 12th January the coroner's officer saw the appellant at his mother's house, and said to him, "I find you bought one ounce

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of cyanide of potassium at Bird's on 22nd December, and signed for it." The appellant replied, "Yes, I wanted it to harden a chisel, as I wanted the chisel to knock off the burr of a hammer." The appellant gave a detailed account of how he would set about such an operation. A search was made, but no chisel could be found. Eventually one was found at the appellant's home. On 15th January, appellant went to a friend and shewed him how he had hardened the chisel, saying at the time that he feared he was to be charged.

Appellant gave evidence at the inquest, and there produced another chisel. Some fifteen to twenty witnesses testified to the fact that he had produced a will. He was short of money. The will was dated 1903. But it was out of all question that he had not procured it to be made at that time. Other evidence was given as to his saying, "Oh, my mother is very ill; she won't last long." But the witnesses were quite uncertain as to the times of his making these general statements. Not a single witness could prove any threat, or even that the appellant and his mother were on bad terms. That was the whole of the evidence against the prisoner.

Before the magistrates, Mr. Ryland Adkins for the Crown took the line that death was caused by poisoning by cyanide of potassium and this was persisted in until the trial at the Assizes when, an analysis having been made, it was found to contain only two grains. At the trial counsel for the prosecution abandoned the theory of death from poisoning and adopted the theory that death ensued from fright occasioned by smelling the solution of cyanide of potassium, and he kept to that theory till the end. When the deceased was ill, the appellant had nursed her, and on one occasion said he gave her fifteen drops of laudanum. He said, "I know what to give you.' The deceased replied, "Don't give me any more," and ridiculed the appellant's asserted knowledge of treatment. It was suggested that the deceased, having heard that appellant had been administering laudanum, unknown to her, became suspicious and was alarmed at the smell of the contents of the glass, and believing it to be an attempt to poison her, died of shock and fright.

The judge at the trial would not allow the case to go to the jury as a case of murder, telling them that they might find attempted murder if the evidence warranted it. The defendant called no

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witnesses, because his statements were relied on by the prosecution. The jury found attempt to murder, and sentence of penal servitude for life was passed.

The appeal is based on these grounds:—

1. There is no evidence of attempt to murder.
2. The judge had no pow to impose more than two years' imprisonment with hard labour, for a common law attempt.
3. That the offence of administering poison with intent to murder (24 & 25 Vict. c. 100, s. 11) is a substantive felony, and was not an attempt within 14 & 15 Vict. c. 100, s. 9, of which prisoner could be convicted on an indictment for murder.
4. No indictment under s. 11 had been preferred.
5. That there was no evidence to justify conviction under that section.

On the authority of *Brown*, 10 Q. B. D. 381; 52 L. J. M. C. 49; 48 L. T. 270; 15 Cox C. C. 199; 47 J. P. 327 (1883); C. C. R., the case must come within 24 & 25 Vict. c. 100, s. 11, or nowhere. Sect. 15 was not intended to extend any other section.

That section runs: "Whosoever shall, by any means other than those specified in any of the preceding sections of this Act, attempt to commit murder shall be guilty of felony and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . ."

The offence cannot be attempt to murder, despite the rubric of 24 & 25 Vict. c. 100, ss. 11—15, which is "Attempts to murder." The particular offence is as old as the Coventry Act of the reign of Charles II., 22 & 23, c. 1 (1670). It is a special statutory offence. It is to be found again in 9 Geo. IV. c. 31, s. 11, and 7 Wm. 4 & 1 Vict. c. 85, s. 2, which award the death penalty. Sect. 11 of 24 & 25 Vict. c. 100 merely re-enacts 7 Wm. 4 & 1 Vict. c. 85, s. 2, with certain additions that in no way touch this case. It is specifically an attempt at poisoning, not an attempt to murder, and is so described in the margin, apart from the rubric.

[The Lord Chief Justice: If you hold it an attempt to murder,

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then the Criminal Procedure Act, 1851, 14 & 15 Vict. c. 100, s. 9 (which provides that on the trial of a felony a verdict of guilty of an "attempt" may be found and punishment for the "attempt" be imposed) justifies the sentence.]

Yes.

[Bray J.: Whereas the prosecution contend that an indictment for murder includes an indictment under sect. 11.]

The offence has been treated as an attempt to murder. There is a confusion between attempt and intent; the judge was wrong in that he treated the offence as coming within 14 & 15 Vict. c. 100, s. 9, as an attempt. The offence might come within 24 & 25 Vict. c. 100, s. 11, if prisoner had an intent to murder, but there was no evidence that prisoner contemplated killing the deceased by the solution found in the glass. The evidence was that if deceased had taken the whole contents of the glass it would not have caused her death.

If it is an attempt to murder, not being this particular kind of attempt, the punishment would be two years' imprisonment. In *Connell*, 6 Cox C. C. 178 (1853), it was held that upon an indictment under 7 Wm. 4 & 1 Vict. c. 85 for administering poison with intent to murder, a previous acquittal on an indictment for murder founded on the same facts could not be pleaded in bar, inasmuch as the statutable offence in the later indictment is a felony, whereas the only jeopardy prisoner was in on the former trial was that of being convicted of an attempt to murder under sect. 9 of 14 & 15 Vict. c. 100, which was only a common law misdemeanour.

[Pickford J.: I am in doubt whether sects. 11—15 of 24 & 25 Vict. c. 100 make separate statutory felonies or whether they only attach a more severe punishment to certain kinds of attempt to murder.]

There is no statutory increase in the punishment.

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[Bray J.: It would be necessary in summing up to jury to direct them to say whether sect. 11 was proved.]

The learned judge directed them as though prisoner was charged with an offence under 24 & 25 Vict. c. 100, s. 11. I submit that such a direction was wrong. To constitute an attempt the act must be a proximate one to the commission of the full offence charged, "forming part of a series," which would, if completed, amount to the full offence. (See Stephen's Digest Crim. Law, 5th ed., Art. 50.) Here the act is not a proximate act, and therefore cannot constitute an attempt. *Linneker*, (1906) 2 K. B. 99; 75 L. J. K. B. 385; 94 L. T. 856; 70 J. P. 293; 21 Cox C. C. 196; 22 T. L. R. 495; C. C. R. No doubt if the dose were enough to kill, the person might wake up and take it. That would be enough for Stephen's definition, for he has then completed all the acts of the series; but here the dose was only two grains. The learned judge misdirected the jury in saying. "It is not necessary for you to find this act would kill; it might be the first or the penultimate dose." Some further act would then be necessary in order to complete the full offence.

On an indictment under sect. 11, such an act as the present would not be complete unless some portion had been taken. It would merely be an attempt to administer within sect. 14. Attempt implies intent, but the converse does not hold good. To be an attempt, the act must be the last act dependent upon the agent himself. *Eagleton*, 6 Cox C. C. 559; Dears. & P. C. C. 575; 24 L. J. M. C. 158; 1 Jur. N. S. 940; 3 C. L. R. 1145 (1854—5).

[Pickford J.: Parke B. there says: "Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are." That is, the act is too remote; that is your point as to the direction as to cumulative or slow poisoning?]

Yes. Other authorities are *Roberts*, 7 Cox C. C. 39; C. C. R. (1855); *M'Pherson*, Dears & B. C. C. 197; 26 L. J. M. C. 134;

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3 Jur. N. S. 523; 7 Cox C. C. 281 (1857); C. C. R. The cases of *Brown*, 24 Q. B. D. 357; 59 L. J. M. C. 47; 61 L. T. 594; 16 Cox C. C. 715; 54 J. P. 408 (1889); C. C. R.; *Ring*, 61 L. J. M. C. 116; 66 L. T. 300; 17 Cox C. C. 491; 56 J. P. 552 (1892); C. C. R., do not destroy the difference between intent and attempt, although they establish the immateriality of the impossibility of the completion of the substantive crime. In *Roberts* it was held that certain evidence which would have been admissible on a common law attempt would not have been admissible in a case of intent.

Further, the date is all-important in an indictment of murder, for the death must take place within a year and a day. The gist of an indictment for murder is the unlawful killing. Prisoner's intention was not to do deceased any fatal injury then, but (if at all) at some future time. If he is charged with the substantive felony under sect. 11, then the means of killing ought to have been set out in the indictment, though it would be otherwise in the case of attempt to murder. A man must know what he is charged with. *Powles*, 4 Carr. & Payne, 571 (1831), where "a prisoner was indicted for mixing sponge with milk and administering it with intent to poison. The indictment was held insufficient because it did not aver that the sponge was of a deleterious or poisonous nature."

Again, in shooting, the indictment must set out that the gun was loaded. It is a substantive felony. *Kitchen*, R. & R. 95 (1805). Upon the record there would appear nothing but the misdemeanour of attempt to murder, which would not be authority for awarding penal servitude for life. (See the concluding words of Williams J. in *Connell*, cited above, p. 262.)

Suppose it were an attempt to murder by strangulation on an indictment for murder. That would be an offence within sect. 15 of 24 & 25 Vict. c. 100, and not contemplated by the 14 & 15 Vict. c. 100. Putting an ox in a field in the expectation and with the intent that the victim might pass through and be gored to death would be an example of s. 15.

[Bray J.: The record ought to shew that he really did administer poison with intent to murder?]

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Yes; otherwise on a conviction for attempted murder upon an indictment for murder it would be left in doubt whether the prisoner's act amounted to a common law misdemeanour or a statutable felony. (See *Campbell* v. *R.*, 11 Q. B. 799; 2 New Sess. Cas. 297; 17. L. J. M. C. 117; 2 Cox C. C. 463 (1849), Ex. Ch.) Therefore the record would be bad. *Connell* shews this state of affairs.

[The Lord Chief Justice: Doubtless sects. 11—13 are specific statutory offences, and the meaning of sect. 14 is clear, but what meaning do you give to sect. 15?]

Sect. 15 may have been intended to include all cases not specifically mentioned in the preceding sections.

If all attempts to murder were to be punishable with penal servitude for life, why could not the legislature have said that? It may have been a slip, but the appellant is entitled to take advantage of that.

[Pickford J.: Does your argument apply to anything but the poisoning? It seems every other act mentioned in sects. 11—13 must be an attempt.]

Sect. 14 itself is an argument to the contrary. Penal statutes must be construed strictly. See *Jenkinson* v. *Thomas*, 4 Term R 665; 2 R. R. 493 (1792), "we must not extend a penal law to other cases than those intended by the legislature, even though we think they come within the mischief intended to be remedied," *per* Lord Kenyon C. J. The rubric is irrelevant. The judges in *Cook*, 20 New South Wales Law Rep. 264 (1899), quoted 2 Russell on Crimes, 7th ed. p. 1967, could not have read *Connell*.

[Pickford J.: If the indictment were under sect. 11 you say he could not have been convicted at all? That is going rather far.]

If, as the judge directed the jury, prisoner was administering doses with intent to murder by slow or cumulative poisoning, there is no evidence of it, but supposing that to be the case, it

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was not an attempt then to murder deceased, but to kill at some future time by some future dose. He had not then the full intention to kill by his act. There is a *locus pœnitentiæ*. He has not the full intent. The summing up of the judge below contained misdirections. He should not have asked the jury, "Did he [the appellant] intend to murder her at some time?" but "Did he intend to murder her then?" It is not a matter of probabilities. The evidence should be overwhelmingly strong before the jury can convict. Dr. Lowman was not asked whether if the deceased had gone on taking it for years it would have done her any harm.

[Bray J.: It was open to the jury to disbelieve his excuse as to hardening tools.]

He gave all the information he could. He told the doctor what the glass contained, the place where he bought it, and his reasons for doing so, and there was no evidence to shew he was not speaking the truth. The judge referred to the evidence of the doctor, and said that that evidence was to the effect that death was due to syncope. Again, after saying he was not going to leave it as a case of murder, he goes on to direct them as to dying of fright. That is misdirection. There was no evidence on which to convict. The evidence of the prosecution was all directed to motives. Take merely an instance of the evidence, when the appellant said, "If she dies—" or "If you see the blinds down send for me at once," that was said on an occasion when deceased was admittedly ill, and cannot be legitimately used against prisoner.

Ryland Adkins (with him *McCurdy*), for the Crown. The case was presented in two ways: murder by fright, and attempted murder. The evidence fully justified it, for there was no need to bring the poison to the house at all. The act was clearly an attempt. It was easily distinguishable from mere preparation. Merely buying the cyanide would have been preparation. But this act was one of a series which was intended to bring about death. It had death ultimately as its object. *Linneker* (above, p. 263) is is favour of this contention. Slow poisoning does

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not necessarily mean a series of doses of one particular poison which has a cumulative effect. If different poisons be tried, each of which would not kill at once, that would be slow poisoning. Each is an attempt. If there were evidence upon which the jury could come to the conclusion that he gave her the poison with a view to kill her it is attempt, and not merely administering with intent. The evidence as to the laudanum shewed, according to the statement of a Miss Lathbury, that the appellant administered a teaspoonful, and not, as he said, merely fifteen drops. Comparatively early he had been giving her a very dangerous dose of laudanum. Again, he said he went twice for the doctor on Christmas Eve when she was suffering from laudanum poisoning. The doctor denied this. Therefore it is open for the jury to say whether or not that one administering was expected at once to cause death, or whether it was one of several doses, and that whether cyanide has a cumulative effect or not.

Connell was wrongly decided; *Cook* (above) shews that; and *Matthews* (cited in *Cook*), 12 N. S. W. L. R. 64; 7 W. N. 118 (1891).

If *Connell* were right the prisoner could be tried again, not only in the case of poisoning, but in every possible kind of attempt to murder.

[Bray J.: That is not unusual. That is why you have two indictments.]

The true view of 24 & 25 Vict. c. 100, s. 15 is that every attempt to murder, whatever the means employed, is a felony, and as such punishable by the penalty inflicted in this case. No doubt it would have been simpler for the legislature to say that every attempt was a felony. The real reason for the omission is a historical one: that part of the statute as to certain attempts to murder was already law, and that the insertion of the words, the omission of which is relied on by the appellant, would have been merely declaratory law. The offences under sects. 11—14 were formerly punishable by death; the death penalty was abolished in the 7 Wm. 4 & 1 Vict. c. 85. This state of the law is carried through to 24 & 25 Vict. c. 100, which, however, makes an addition in the shape of sect. 15.

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[PICKFORD J.: The reason could not have been entirely historical, for the legislature keep on adding offence *e.g.*, strangulation, shooting, blowing up ships, &c.]

My submission is that the 24 & 25 Vict. c. 100 for the first time embraced all kinds of attempts to murder, and constituted all of them felonies, punishable with penal servitude for life. It is true several statutory offences may be included in one indictment, but even if that did not follow from the 24 & 25 Vict. c. 100, the result would merely be that, on a failure to convict of murder, there would have to be a new indictment on the same evidence. This was the very mischief remedied by the Act of 14 & 15 Vict. c. 100, s. 9, and it involved no hardship to the prisoner.

The argument that the record discloses an offence which might not be punishable with penal servitude for life is not sound, for the 24 & 25 Vict. c. 100 removed this difficulty. The Act comprehends all attempts, and therefore on the record there will be nothing. Means do not have to be shewn in an indictment for murder.

Effect should be given to the rubric. The special words in sect. 15 strengthen this view, viz., "attempt to commit murder" and "by any other means, &c." The word "those" amount to a recital of the particular means which were previously the subject of special statutes. The judgment of Lord Coleridge C. J. in *Brown* (above) at p. 384, supports this view. See the words, "All those things . . ." to the end of that judgment.

The effect of the whole statute together is to make every form of attempt to murder punishable by penal servitude for life. *Connell* ought not to be followed. At that time only a certain number of attempts were felonies. All are felonies now.

[BRAY J.: What do you say as to the relation of intent to attempt?]

There is no substantial difference where an act in pursuance of the intent is done. Intent must include some act that is not merely far off preparation. It is difficult even to conceive of a case where administering poison does not include an attempt. Intent alone does not amount to attempt, but it does when it

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comes to administering with intent. That justifies the rubric, and is more in accord with sect. 15.]

Maddocks, in reply. There is no instance where there has been a conviction in circumstances like those, where an attempt to murder has been treated as a felony and not as a common law misdemeanour. (2 Hale's Pleas of the Crown, 185.) "Murder" is a term of art implying unlawful killing. Unlawful killing is the gist. Under sect. 11 the gist is the specific intent. It is an old offence, too old to be admitted now into the category of attempts to murder.

A man cannot attempt to murder without intending. (*Morris*, L. R. 1 C. C. R. 90; 36 L. J. M. C. 84; 16 L. T. 636; 10 Cox C. C. 480 (1867), a case of constructive manslaughter.)

Weight must be given to the words in sect. 9 of 14 & 15 Vict. c. 100, "the particular felony." The prosecution must go the length of saying that 24 & 25 Vict. c. 100 was intended to and does amount to an abrogation of an attempt to murder at common law. It further follows that on an indictment for murder prisoner may be convicted of any of the offences described in sects. 11—15 of that Act without an indictment being preferred for such offences.

[Bray J.: Can you give an illustration where there might be an intent to murder yet no attempt, apart from *Linneker?*]

In the present case of poisoning by a series of cumulative doses.

[Pickford J.: Can you give any other illustration?]

I have no other. But in looking at the words of these sections one finds varying degrees of intention. As to sect. 11, there must be the fullest intention to take life at the time the act was done.

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Bray J. read the following judgment:—

In this case the appellant was indicted for the murder of his mother, and was convicted of an attempt to murder, and sentenced to penal servitude for life He appeals from this conviction on

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several grounds, which we will deal with one by one. First, it is said that there was no reasonable evidence on which he could be convicted, or as it is put in sect. 4 of the Criminal Appeal Act, that the verdict cannot be supported having regard to the evidence. The evidence put shortly was this, that on the 9th of January last the mother was found dead in a sitting posture on a sofa in a sitting-room in her house. There was a round table standing two feet from the sofa, on the further side of which was a wine-glass, three parts filled with a liquid made up of a drink called nectar, and, as was afterwards shewn, containing two grains of cyanide of potassium. There were also on the table a nectar bottle, two lumps of sugar, and a spoon. There was no evidence to shew that she had taken any of this liquid, and the result of the post mortem and of the analysis of the contents of the stomach and of the contents of the wine-glass was to shew she had not died from poisoning by cyanide of potassium, but that death was most probably caused by syncope or heart failure, due to fright or some other external cause, and further that the quantity of cyanide of potassium in the wine-glass was, even if she had taken the whole, insufficient to cause her death. The appellant was proved to have bought cyanide of potassium on the previous 22nd December. He stated in his evidence that he bought it for case-hardening a chisel, and that he had placed it in a cupboard in the room where the mother was found dead, and that he thought it possible she might have taken it from there. The prisoner did not live in this house. No traces of any of this poison were found after death either in the cupboard or in the house, nor of the newspaper in which the appellant said he had wrapped it. There was a good deal of evidence shewing that the appellant had a motive for killing his mother, viz., to obtain her money, she having made a will in his favour, and also shewing that the appellant had made several statements previous to the 9th of January to the effect that he expected his mother's death, although in fact her state of health was not such as to shew that she was in any danger. In our opinion this evidence was sufficient to warrant the jury in drawing the inference that the appellant had put the cyanide of potassium in the wine-glass. It was strongly urged that even if this was so, the smallness of the dose shewed that he could not have had the intention to murder her, but there was evidence

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that on some day between Christmas Day and the New Year the prisoner had produced to a witness (Carden) from his pocket a small substance about the size of a marble, which appeared to him to resemble sugar candy, and stated, "This stuff is a deadly poison, a small quantity about the size of a pin's knob put into a little water would sober you (*i.e.*, the witness) if you were drunk, instantly." There is no doubt he was referring to the cyanide of potassium, which he had bought a few days previously. He therefore perfectly well knew the deadly character of this poison, and supposed that a very small quantity would produce an instant effect. Upon consideration of all the evidence, including the denial of the prisoner that he had put anything into the wine-glass at all, we are of opinion that there is sufficient evidence to warrant the jury also in coming to the conclusion that the appellant put the cyanide in the glass with intent to murder his mother.

The next point made was that if he put it there with that intent, there was no attempt at murder, that the jury must have acted upon a suggestion of the learned judge in his summing up that this was one, the first or some later, of a series of doses which he intended to administer, and so cause her death by slow poisoning, and that if they did act on that suggestion, there was no attempt at murder because the act of which he was guilty, viz., the putting of poison in the wine glass, was a completed act, and could not and was not intended by the appellant to have the effect of killing her at once. It could not kill her unless it were followed by other acts which he might never have done. There seems no doubt that the learned judge in effect did tell the jury that if there was a case of slow poisoning the appellant would be guilty of the attempt to murder. We are of opinion that this direction was right, and that the completion of one of a series of acts intended by a man to result in killing is an attempt to murder, even although this completed act would not, unless followed by the other acts, result in killing. It might be the beginning of the attempt, but would none the less be an attempt. While saying this we must also say that we do not think it likely the jury acted on this suggestion, because there was nothing to shew that the administration of small doses of cyanide of potassium would have a cumulative effect. We think it much more likely, having regard to the statement made by the witness Carden, that the

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jury thought that the appellant supposed he had put sufficient poison in the glass to kill her. This, of course, would be an attempt to murder.

We now come to the most difficult point, which was this: that under sect. 9 of the 14 & 15 Vict. c. 100 if the appellant were found guilty of attempting to murder it would be a conviction of the Common Law offence of attempting to murder, and not of any of the special statutory offences under sects. 11 to 15 of 24 & 25 Vict. c. 100. If this point were a good one, the punishment would be only two years' imprisonment instead of penal servitude for life, which could be given in case of a conviction under any of the sects. 11 to 15 of the Act of 24 & 25 Vict. c. 100. The argument on the part of the appellant was this: that sects. 11 to 15 of 24 & 25 Vict. c. 100 dealt with special offences, viz., sects. 11 to 13 doing certain acts with intent to murder, sect. 14, attempting to do such acts with intent to murder, and sect. 15, doing other acts not mentioned in the previous sections with the like intent; that these were made special statutory offences distinct from the Common Law offence of attempting to murder, and that the attempt referred to in sect. 9 of 14 & 15 Vict. c. 100 was the Common Law offence, and not one of these special statutory offences. In support of this it was said that at the time of the passing of 14 & 15 Vict., though the statutory offences comprised in sects. 11 to 14 in 24 & 25 Vict. c. 1, existed under earlier Acts now repealed, they were not known as attempts to murder. They did not comprise all attempts to murder, there being no enactment having the effect of sect. 15, and the only offence known to the law as attempt to murder is the Common Law offence, and that must have been the offence contemplated by that Act. Further, it was argued in proceeding under sects. 11 to 15 of 24 & 25 Vict. the indictment must state the particular offence under the particular section; there could not be one indictment charging the different offences under each of the sections alternatively, and that the result of holding that under an indictment for murder a man could be convicted of one of these special statutory offences would enable the prosecution to include in one indictment a number of special statutory offences, and that if that had been intended it would have been enacted by 24 & 25 Vict. c. 100, s. 15, "Whosoever shall by any means attempt to murder shall be guilty of felony, &c."

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Finally it was argued that there was a difference between doing an act with intent to murder and attempting to murder.

In support of all these points great reliance was placed on *Connell* [above, p. 262].

The argument on the part of the prosecution was that the Act of 24 & 25 Vict. for the first time dealt comprehensively with all attempts to murder and made them all felonies, and all punishable with the same maximum punishment, viz., penal servitude for life. So that after the passing of 24 & 25 Vict. c. 100, on a conviction for an attempt to murder under 14 & 15 Vict. c. 100, the conviction was a conviction under 24 & 25 Vict. c. 100, and punishable with penal servitude for life, that although this might have the effect of including in one indictment several special statutory offences, that was the necessary consequence and effect of the Act 24 & 25 Vict., and if it were not so there must in every case where there was a failure to prove the charge of murder be a fresh indictment and a fresh trial on exactly the same evidence, which would lead to the same result, and that this was the very mischief which the Act, 14 & 15 Vict. c. 100, was intended to remedy, and that no hardship on the prisoner would result; no new evidence would be introduced; he would be convicted of the attempt on the same evidence which was relied on to prove the complete offence; and as to the last point that there could not be an attempt to murder unless there was an intent to murder, so that if a prisoner were convicted by the jury of an attempt to murder he must necessarily have been convicted of an offence within one of the sects. 11 to 15 of 24 & 25 Vict. c. 100. After full consideration, and having had the advantage of hearing a most able argument from Mr. Maddocks, we have come to the conclusion that the reasoning of the prosecution is sound and must prevail.

We will deal first with *Connell*. The ground of that decision seems to be that the record would merely shew a conviction for an attempt to murder, and it would be consistent with the record that the attempt had been by some means other than those mentioned in the special statutory offences, which at that time, 1853, did not include an offence under sect. 15. It might be, therefore, that the prisoner was convicted of an offence which was only punishable as a Common Law misdemeanour, and there would be no authority for the statutory punishment. It would

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be consistent with the record that the man should have been sentenced to penal servitude for life when he had only been guilty of a Common Law misdemeanour. We think *Connell* may be distinguishable on this ground, but the passing of 24 & 25 Vict. c. 100, removed this difficulty. That Act was intended as a code for all attempts to murder. This group of sects. 11 to 15 is headed with the words "attempts to murder," and these words fortify the conclusion at which we have arrived. After the passing of that Act all attempts at murder necessarily fall within one of these five sections. If that Act had provided in so many words that all attempts to murder should be punishable with penal servitude for life, the effect of such an enactment on sect. 9 of 14 & 15 Vict. c. 100, must have been that if the prisoner were convicted of the attempt to murder, penal servitude for life could be awarded and sects. 11 to 15 of 24 & 25 Vict. substantially were such an enactment. It is not a sound argument that if that had been intended there would have been this one section and that alone, because we know that in Acts which are intended to consolidate as well as amend the law it is the practice to re-enact sections in the repealed Acts, and then to fill up any gap rather than frame new sections in new language. By the time the Consolidation Act comes the language of the old sections has often been judicially interpreted, and it is desirable to use the same language. We think no such inference as was suggested by Mr. Maddocks can be drawn from the absence of the simple provision that all attempts to murder should be punishable with penal servitude for life. As to the difference between acts which are attempts to murder and acts which are done with intent to murder, we feel some difficulty in accepting what Kennedy J. says in *Linneker* (above, p. 263), but however that may be, it is sufficient to say, as we have already said, that all the offences in sects. 11 to 15 are treated as attempts to murder, and there cannot be an act done with intent to murder without its being an attempt to murder, and a prisoner cannot be convicted under sect. 9 of 14 & 15 Vict. c. 100, unless, as here, the jury have found him guilty of an attempt to murder. For these reasons we think the appeal fails and must be dismissed.

Appeal dismissed.

Solicitor for the Appellant—*Maddocks, Ogden & Co.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY, AND L. COLERIDGE J.

GEORGE BLAKE.

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George Blake.

Prisoners jointly indicted must be tried separately on an allegation of being a habitual criminal.

This was an application for leave to appeal against conviction as a habitual criminal at the Northumberland Assizes on February 17th, 1910. The primary charge was breaking and entering a dwelling house. Applicant was tried with another prisoner as a habitual criminal. Mr. Commissioner Scrutton, K. C., sentenced him to five years' penal servitude and five years' preventive detention.

The LORD CHIEF JUSTICE: The Court have a difficulty in conceiving a case in which two men alleged to be habitual criminals ought to be tried together. The question whether a man is a habitual criminal or not must depend on his past life, and what he has done since his last release, and it is scarcely possible for the circumstances of two different cases to be identical. It is therefore, as a question of practice, an important matter that a man on trial as a habitual criminal should be tried separately.

Application dismissed.

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Horace William Chapman.

HORACE WILLIAM CHAPMAN.

A railway ticket may be the subject of an indictment for obtaining by false pretences.

Boulton (1 *Den. C. C.* 508; 1849) *approved.*

This was an appeal, by leave of Walton J., on grounds of law and fact against conviction for obtaining a railway ticket by false pretences. Appellant was convicted on March 31st at the Leeds City Quarter Sessions and sentenced to twelve months' imprisonment with hard labour.

V. B. Mockett for the appellant (under s. 10 of the Criminal Appeal Act), who was present. Appellant was indicted for obtaining a railway ticket by false pretences. There were also two counts under the Debtors Act. On Feb. 1st appellant went to the station-master at the Leeds Midland Station and asked for a ticket to London for his wife; he said the banks were closed and he was short of money. He stated that he was well known at the Queen's Hotel (the Midland Railway's), Leeds, that he had a monthly account there, that his two sons were ill near London, and that his wife must go to see them at once. On the faith of these representations a ticket was granted him. A letter subsequently sent demanding the money was returned undelivered, but it was wrongly addressed. He denied making any of the alleged representations except that he was known at the hotel—which was true. The point raised before the learned Assistant-Recorder was whether a railway ticket could be properly described in the indictment as a chattel. Counsel for the Crown cited *Boulton*, 3 Cox C. C. 576; 1 Den. C. C. 508; 2 C. & K. 917; T. & M. 201; 13 Jur. 1034; 19 L J. M. C. 67 (1849), where the Court for Crown Cases Reserved held that it was a chattel. But there are no reasons whatever given to support the decision, and the case has been severely commented on by many learned editors, *e.g.*, Russell on Crimes (7th ed., 1909) 515: A railway ticket is no more than evidence of a contract; there is no intent on the part of the owner to part with property, for the ticket is to be returned at the end of the journey.

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[The Lord Chief Justice: The piece of pasteboard enables him to travel, for by giving it up at the end of the journey he shews that he has paid for his ride. The railway company, therefore, do not part with it for nothing.]

My submission is that they do not part with the property in the ticket. The judgment in *Boulton* is not right, because one of the very essentials of the crime is wanting—the appellant did not obtain the property in the ticket. He merely obtained temporary possession of it. The essence of the misdemeanour is property, not possession. The doctrine is clearly put in *Kilham*.

[L. Coleridge J.: Suppose you get me to lend you my coat by means of a false pretence?]

That falls within the principle of *Kilham*, L. R. 1 C. C. R. 261; 39 L. J. M. C. 109; 22 L. T. 625; 11 Cox C. C. 561 (1870); and my submission is that the present case is substantially similar. For the appellant returned the ticket directly he arrived at St. Pancras.

[L. Coleridge J.: In *Kilham*, Bovill C. J. says the word "obtain" in sect. 88 of the Larceny Act "does not mean obtain the loan of, but obtain the property in, any chattel," &c.]

That is the submission here. In *Kilham*, it is true, *Boulton's case* was distinguished on the ground that the prisoner, by using the ticket for the purpose for which it could be used, viz., travelling, entirely converted it to his own use; but my submission is that appellant did not do so in the present case, for the reason already given. *Watts*, 6 Cox C. C. 304; 2 C. L. R. 604; 18 Jur. 192; Dears. & P. C. C. 326; 23 L. J. M. C. 56; 2 W. R. 233 (1854)—choses in action are not the subject of larceny at common law—is in favour of the appellant. It was held there that an unstamped agreement, being merely evidence of a chose in action, cannot be the subject of larceny. A railway ticket is clearly only evidence of an agreement.

There is a footnote in Stephen's Digest of the Criminal Law, 250 (6th edition), where it is said as to *Boulton* that "it is very hard to reconcile the decision with the established principle as

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to 'choses in action," for what is a railway ticket except evidence of a contract by the railway to carry the holder?" The appellant had no intent to defraud, within the Debtors Act.

[L. Coleridge J.: In *Morrison,* Bell C. C. 158; 28 L. J. M. C. 210; 5 Jur. N. S. 604; 8 Cox C. C. 194 (1859), the decision in *Boulton* is commented upon. Here Crompton J. says that a railway ticket, like a pawn ticket, is in the nature of a token. The Court had no difficulty in the case of a pawn ticket which was the subject of *Morrison.* A railway ticket is in the nature of a mere agreement.]

A pawn ticket presents less difficulty, being a warrant for the delivery of goods under the Larceny Act. It may be said that a "token" is something in addition to a contract. A director's pass might be a token, but if it be one indicating a right we merely come back to a chose in action, and a chose in action cannot be the subject of larceny; the authorities are clear, and a railway ticket is only evidence of a chose in action.

[L. Coleridge J.: You want us to overrule *Boulton?*]

If your lordships hold a railway ticket to be the subject of larceny here, it is in the face of *Watts.*

As to the fraudulent intent. The appellant went to the station master, said he was well known at the Queen's Hotel, and had an account there; that he had two sons at school the other side of London who were taken ill, and that it was imperative that his wife should go there to see them. With regard to two of the representations alleged, the prosecution did not give the slightest evidence of falsity. The sole evidence concerning them was that the station master said that they were made. The appellant was, in fact, well known at the Queen's Hotel, and had an account there. The hotel porter corroborated his story, and proved that he constantly stayed there.

[L. Coleridge J.: But any one of the false pretences would suffice. The story about the two sons suddenly taken ill at school was false. When asked at the trial about this he said he knew nothing about it. The jury believed the station master, who

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said the statements were made, and that it was on that plea that the appellant asked to have the ticket.]

The appellant's subsequent conduct negatives intent to defraud. He said he was willing to pay, and would have done so if the demand had been made. He gave his card, but the letter of the Company asking for payment never reached him; it miscarried, having been wrongly directed to "Mr. Chapman," instead of to "Mr. Chapman, England, Chapman & Co." The letter was consequently returned to the postal authorities; so that appellant cannot be said to have disregarded the demand.

[L. Coleridge J.: Did he not give an address where he had been sold up previously?]

Yes; but letters sent there were forwarded to him. The Company were to go to the Queen's Hotel to ask for the money.

[L. Coleridge J.: Why did he not pay? That is the question. Did he offer payment when arrested?]

That does not appear. There is something further in his favour, for he was in the habit of having Midland Railway passes, and, on demand sent in to him, of paying the money. Cheques and receipts were put in evidence for appellant.

In the summing up the learned Assistant-Recorder does not refer to any of the events subsequent to the night in question. These are the most important facts. They indicate absence of intent to defraud.

[L. Coleridge J.: He puts it to the jury: "Did he intend to pay for the journey?"]

C. Felix Palmer, for the Crown, was not called upon.

The Lord Chief Justice: In this case the appellant was indicted for obtaining a railway ticket by false pretences, and also for obtaining credit, by means of fraud other than false pretences, in incurring a debt of twenty-five shillings and ninepence. It

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is quite impossible for us to allow this appeal, as the jury must have been satisfied of facts which would have proved him guilty of the other offences charged. It is contended that a railway ticket is not the subject of larceny, because either it is merely evidence of a contract that someone should be allowed to travel, or because, if a chattel, it was never intended to become the property of the appellant, and was to have been given up at the end of the journey. But there is the authority of *Boulton* that such an indictment as the present can be supported. Whether hereafter we may have to reconsider the decision is another matter. It is a reasonable decision, and it binds this Court. The case was considered in *Kilham*, and distinguished; and it was elaborately discussed in *Morrison*. We quite agree that in the case of a pawn ticket the argument may be stronger, but the decision in *Boulton's case* has never been overruled. As to the intent to defraud, we have listened carefully, and it seems to us that one of the most material of the false pretences was with regard to the illness of the two children. The station master puts it forward in a specific statement, and when the appellant was cross-examined he said he did not know anything about it. Then, again, it is suggested that the jury ought to have found that he meant to pay. But against that is the fact that he gave no address at which he could be found. There was, we think, abundant evidence for the jury; and we are not here to re-try cases properly left to the jury.

Appeal dismissed.

Solicitors for the Respondents—*Beale & Co.*, Birmingham.

Robert Bradshaw, John Edwards, Morris Jones, Robert Jones, Thomas Jones.

ROBERT BRADSHAW, JOHN EDWARDS, MORRIS JONES, ROBERT JONES, THOMAS JONES.

Omission in a summing-up to tell the jury in terms what the defence is does not amount to misdirection if the issues in the case are in substance put to the jury in the summing-up.

This was an appeal, on grounds of law, against conviction for unlawful wounding; appellants were each sentenced to three months' imprisonment with hard labour at the Merioneth Quarter Sessions on April 5th, 1910.

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Robert Bradshaw, John Edwards, Morris Jones, Robert Jones Thomas Jones.

Ellis Griffith for the appellants (under s. 10 of the Criminal Appeal Act), who were not present. The charge here was of inflicting grievous bodily harm on gamekeepers. There were three keepers, and the party of the prisoners numbered six, one of whom, Evan Evans, was not charged. The rival parties first met on the Bala road when a policeman was present; but no assault took place then. On the same day, the 23rd January, they encountered one another at the top of the second field from the road. The assault is not denied. The whole question is as to who was the aggressor, the case of the defence being that appellants were acting in self-defence. At the time immediately preceding the second meeting the keepers were about two or three hundred yards away when they first saw the prisoners. They followed the prisoners up the field, and the point made for the prosecution was that they did so to intercept the appellants on their way to the pheasantry. As to weapons, a considerable number of young trees were produced in Court which were supposed to have been generally used on this occasion. It was clearly proved that none of the prisoners came with sticks, and none of them had sticks when they met the keepers at the top of the second field, or at any rate it is not clear that any of the prisoners had sticks then. The sticks could be found in abundance in the hedge there. Riley, one of the keepers, came only half-an-hour later than the assault to the very spot, and could find no stick there. But later, at eight o'clock, they were found there in the snow.

At 2 a.m. a police constable went to the spot with Hughes, one of the keepers. He could find no sticks. The point made by the defence was that it was curious that the sticks were found at eight o'clock and not at other times.

No one was hurt on either side except R. Jones, one of the keepers, who was badly injured, according to the doctor's evidence.

No stones were found, and appellants denied throwing any.

As to the summing up, the submission is that the Chairman ought to have directed the jury as to the law of self-defence. He said nothing whatever on the point. He also said that the evidence of the police constable must be followed, but the officer was not present. The summing up is absolutely silent as to what took place at the time of the assault, except so far as a conversation

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which took place in the field between a keeper and Bradshaw, one of the appellants, before the assault was concerned. There is not a word in it as to who were the aggressors, whether stones or sticks were used. Frankly, Evan Evans was not called because he had been engaged in a quarrel that night before the incident. Counsel is entitled to exercise his discretion.

[BRAY J.: Evans said they did have sticks, did he not?]

Yes; but he said the keepers were the aggressors. The Chairman was bound to put the defence to the jury. (*Dinnick*, 3 Cr. App. R. 77; 26 T. L. R. 74 (1909); *Carman Deana*, 2 Cr. App. R. 75; 25 T. L. R. 399; 73 J. P. 255 (1909), where it was held a misdirection to say that "no one has a right to return blow for blow.") A man might be justified in striking the prosecutor if it was reasonably necessary for self-defence.

Appellants are entitled to a proper direction; here the real point of issue was never left to the jury.

Artemus Jones, for the Crown. The summing up must be judged in the light of all the facts. The defence at first was that the injuries were accidentally caused by the projecting roots of the young trees which were near the scene. When the summons was issued they denied that they were there at all. Evan Evans was not charged because the keepers were not sure of his complicity. He, however, gave evidence before the magistrates, and the effect of his evidence was to destroy the whole theory of self-defence. There was considerable conflict as to the facts. The case for the prosecution was that appellants came back upon their tracks.

Ellis Griffith: They came back from Bala waiting for the election results; it began to snow, and they took what was the shortest cut.

[L. COLERIDGE J.: That is not the point; what requires explanation is that they diverted their course from the place called the Lovers' Walk and came back again towards the keepers.]

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Artemus Jones: The story of the defendants was that the scuffle took place at the Lovers' Walk; the prosecution averred it took place sixty yards below that place. The whole case hinged on the locus of the *fracas*. The story of the keepers was that they, the keepers, made their way across the field leading to the pheasantry, in case anything was attempted there. As soon as they got near the field, a shower of stones came from the corner of the field where they were, and then appellants came up and attacked them.

It is true the Chairman must put the defence before the jury in summing up, but bearing in mind that this trial had been considerably protracted, that lengthy speeches were made on either side, it is submitted that in substance the defence was put to the jury when the issues were placed before them.

Ellis Griffith, in reply: If the jury obeyed the direction they could not but find for the prosecution. They could not but convict. In effect, the Chairman said, "Whoever is injured in a scuffle is the aggrieved party."

[Bray J.: Whether this be a misdirection or non-direction, the point is, could it affect the result?]

Appellants are entitled to a proper trial by jury, and not one, however excellent, by your lordships. The omission was vital unless your lordships think it amounts to a mere technicality or formality. *Makin* v. *Attorney-Gen. of N. S. W.*, (1894) A. C. 57, is in point as to the right of prisoners to have their case put to the jury.

[L. Coleridge J.: One statement in the summing up you have not commented upon is that where the Chairman drew attention to the keeper's, Robert Jones's serious injuries. When one finds out that none of the prisoners received any injuries, and that this one man, an old man of sixty-five, was seriously hurt, the jury were entitled to take these facts into consideration.]

But even on that matter the summing up does not give the appellants a chance. Robert Jones was injured by the defendants as a body.

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—
Robert Bradshaw, John Edwards, Morris Jones, Robert Jones, Thomas Jones.

The LORD CHIEF JUSTICE: We must repeat Lord Esher's words in *Abrath* v. *N. E. Rail. Co.*, cited in *Joseph Stoddart's case*, 2 Cr. App. R. 246 (1909), as to the difference between misdirection and non-direction: "It is no misdirection not to tell the jury everything which might have been told them. . . . Non-direction merely is not misdirection." As we have said, it is only in very peculiar circumstances that we can support a conviction after misdirection. Sometimes, no doubt, non-direction may amount to misdirection: but in our judgment the omission of the Chairman to call attention in terms to the particular case set up here for the defence did not amount to misdirection. From what the Chairman said, it is obvious lengthy speeches had been made by counsel on both sides. There had been also great conflict as to who began the scuffle, and as to where it took place. There was evidence shewing that the scene was at some point out of the way prisoners were going. There was also very remarkable evidence of obtaining and being in possession of the sticks. There was also a conflict of evidence as to what had happened in the road, and whether or not the defendants had turned back on their tracks. The Chairman does refer to this, and indicates to the jury how they may guide themselves as to the truth. Having regard to the evidence given, and to the witnesses called before the magistrate and not called at the trial, it seems impossible to say that this non-direction amounts to misdirection. It is true that the word "self-defence" was not used in the summing up, but we cannot say there has been any miscarriage of justice because the particular point was not mentioned in terms which both counsel have admitted was the only real point in issue.

Appeals dismissed.

George Wright, Albert George Brassington and Albert Marsh.

GEORGE WRIGHT, ALBERT GEORGE BRASSINGTON, AND ALBERT MARSH.

Where, after hearing fresh evidence, there is a grave conflict of testimony, the Court will lean to the side of leniency.

This was an appeal against conviction by leave of the full Court, on the reference of Walton J. Appellants were convicted at the Cardiff Assizes before Lord Coleridge J. on 16th March.

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1910, for robbery with violence, and sentence was passed on each of fifteen months' imprisonment with hard labour. On April 21st the Court gave leave to appeal, and also allowed counsel; the Registrar was empowered to instruct a solicitor to act, if he was satisfied that appellants had not the means to instruct one; leave was also given to call certain witnesses.

Vaughan-Williams, for the appellants (under s. 10 of the Criminal Appeal Act), who were present. This case caused the learned judge at the trial much anxiety. This appears from the summing up, which commented on the absence of certain witnesses who might well have been called.

It was a case of robbery with violence in a house which was practically a house of ill-fame. Brassington was a railway signalman employed by the Taff Vale Railway, and bore a good character for honesty.

Pierce, the prosecutor, was a seaman who had come from Barry on 22nd January, and spent the afternoon drinking. It seemed that he had been going about with a Mrs. Thayer, with whom he had been previously associated on his visits ashore. They went to a place in Eldon Road, and—according to the defence—while in that neighbourhood he met with injuries. This would be as early as 10 p.m., that is long before 2.30 or 4 a.m. of the morning of the 23rd, the time at which it was alleged by the prosecution he had received the injuries charged. He had been to various public-houses, but denied he had had too much to drink. The defence suggested that he had got very drunk, and was assaulted while in that condition. At midnight he met one Eva Harris, with whom he entered a hansom cab. They drove to various places, and ultimately arrived at 25, Somerset Street, a house where Eva Harris lived. This was the house in which the prosecutor alleged the appellants had assaulted and injured him. After his arrival there it was common ground that beer costing fifteen shillings in all was sent for, and a general carousal ensued for some time, in which the three appellants joined. It was after this that the prosecutor said the assault took place. It was common ground that he had not seen the appellants before going to that house.

For the defence, evidence was given by a butcher, who said he remembered the prosecutor and the woman Eva Harris coming

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in a cab to his shop, where they bought some pork; he noticed then that the prosecutor had his eye injured. He advised him to apply to the contusion a piece of beef. It would have been a matter of importance to call the cabman too, as to injuries received before going to Somerset Street. The judge had pointed this out at the trial. It is conceivable that the man might feel afraid in certain circumstances to give evidence. But he was willing to do so now, and would be called. There would also be the additional evidence of three women, who would speak as to the Eldon Street scuffle which occurred earlier in the day outside the house of a Mrs. Cornish.

William Parsons, examined by *Vaughan-Williams*, said he was a cabman and on the night of the 22nd he was on the rank opposite the Theatre Royal; that he secured a fare at 12 p.m. It was the prosecutor and a woman. They drove to two places before finally reaching Somerset Street. They went first to a butcher's shop, namely James', then later to a fruiterer's. The man's condition was as if he "had had a rough time"; he kept his handkerchief to his face throughout. The man paid three shillings fare. He looked as if he had been having liquor. The witness further said that he was asked by Brassington's father to give evidence at the Assizes; he refused, saying he did not want to be "mixed up in it."

Cross-examined by the *Hon. Herbert Bailey* for the Crown, the witness denied having given as a first excuse for not giving evidence that he could not recognise anyone. He could not say which eye was hurt; he only recollected that the prosecutor kept his hand up to his eye, and appeared to be in pain. They did not visit a cigarette shop. He did not see where the prosecutor got his money from.

Emily Harris, examined, said she remembered the 22nd January; she saw Pierce on the ground, with three or four men on him. One was on top of him, another was kicking him, a third putting his flagon back into his pocket as if thinking better of his first intention to strike the prosecutor with it. She did not think Pierce was sober. The spot was distant from Somerset Street about half a mile. Cross-examined, she said she saw Pierce a week later in another house, 80 or 83 Eldon Road; she was in-

troduced by a Mrs. Leslie. She was asked by Mrs. Wright to give evidence. She did not see any attempt made to rob the prosecutor by any of the four men. He was on the ground for ten minutes being badly mauled, but made no attempt herself to call assistance; there were plenty of other people about. She volunteered her evidence when she heard Mrs. Wright's husband was in prison. She was in no way related to Eva Harris.

Eva Harris, examined, said she had not known William Pierce before meeting him on that night. The prosecutor's right trouser leg was split. He had his handkerchief to his eye, because he had been fighting with four men. That was what he said. They took a hansom cab and went to James, the pork butcher's. James advised the prosecutor to apply beef to the injured eye. They then went to a fruiterer, after which they drove home to the house of the witness. The three appellants came to 25, Somerset Street about a quarter to one. Beer was fetched three times, to the amount of fifteen shillings' worth, in flagons. Prosecutor asked if he might lie on the sofa; he was lying there all the time; he said he was feeling unwell. The witness left at about 1.30 a.m. and went on to Mrs. Wright's house, leaving the prosecutor at home with the three appellants.

Cross-examined by Bailey: The witness said she was in Court at the Assizes, but did not give evidence. She was charged together with the prisoners, and was with them at the police court. She could not say which eye was injured, but rather thought it might have been the left eye. She did not see where Pierce got the money from. When at 25, Somerset Street he asked if he could purchase beer for the company. He seemed bad, apart from his black eye. Brassington was there that night. It was quite untrue to say that Brassington came down to see the witness for an immoral purpose. The witness did not know Mrs. Thayer except by sight. Brassington often visited the witness. She had never seen Marsh before, nor did she know Mrs. Cornish.

Re-examined: At Cardiff was under remand for a week; that was why she could not cook the pork that had been bought at James'. She was discharged subsequently.

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By the Court: Pierce did not dance that night. He took me home for an immoral purpose; I invited him, and he accepted. I cannot say whether he said he was too ill for that. He asked leave to lie on the couch. It was while drinking and dancing were going on. The dancing and drinking did not go on till 2.30 a.m.: it left off at 1.30 a.m., when I left.

Kate Wright, examined, said she was the wife of the appellant, George Wright. She lived at 14, Somerset Street, practically opposite No. 25. Had known Brassington about six months. Brassington had come to see the witness's husband to shew him some books. Marsh came too. The witness went out to No. 25, and at about 12.30 Eva Harris came back there. Prosecutor's nose was bleeding. The witness left No. 25 at 2.30 a.m.

Cross-examined: She was positive prosecutor got his money to buy the beer with from his trouser pocket. He said he had been set upon by three or four men. She asked Mrs. Emily Harris to give evidence. She met Eva Harris quite accidentally. She could not afford to keep house while her husband was away. The men were not in the house five minutes after the witness left. Eva Harris went with her. The three prisoners had not left.

Vaughan-Williams: The doctor gave in evidence not the actual condition of the man, but what he anticipated would be his state. The injuries were sustained some time before four o'clock on the morning alleged, and these injuries were inclusive of the broken ribs. The doctor only saw him at 2.30 p.m. on the 23rd, therefore many hours elapsed before he was called in at all. If the prosecutor had been so bad as alleged, his agonies would have caused the doctor to be sent for at a much earlier stage. Hence it is submitted the doctor was conjecturing.

The onus is on the prosecution to satisfy the Court. The man was in a sodden state, and then met Eva Harris. He went in a cab, and at the house begins to complain immediately, and asks to go on the couch. If he woke up and found this woman gone, perhaps finding in the meantime that his injuries had become more painful, he probably would go to the police.

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[L. Coleridge J.: He was not too muddled to notice the three prisoners.]

They came forward subsequently in a perfectly innocent fashion.

[Bray J.: I do not think there is any evidence that the prosecutor had any of the drink at Somerset Street.]

It is not suggested he did.

All three appellants bear good characters. There is no evidence in their past lives of anything tending to violence. The whole case amounts to the uncorroborated evidence of a drunken man.

The *Hon. Herbert Bailey* for the Crown. Every single witness called now could quite well have been called at Cardiff. The cabman has now explained, it is true, that Brassington endeavoured to get him. The first story was that some episode took place with one Arthur Lewis.

[Bray J.: The prosecution might have called Lewis below and here to-day.]

Vaughan-Williams: Mrs. Thayer is here, and can be called to speak concerning Lewis.

Mrs. Thayer, examined, said she lived in Eldon Road, Cardiff. She had known the prosecutor well for seven years: she was kept by him. He came to the witness's house at about four o'clock, and went to take some things out of pledge. Lewis was not in the witness's house at all that day. The witness did not live with Mrs. Cornish; Mrs. Cornish lived next door. The witness saw nothing of any fight at all. Pierce went to strike at the witness with a flagon, but did not.

Cross-examined: The witness knew that Lewis had been in trouble on one occasion since that day.

Bailey: Counsel for the defence at the Assizes put this story forward first, and nothing was said about the Lewis and Thayer

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quarrel, after the cross-examination of the prosecutor by Wright's counsel.

[Bray J.: Arthur Lewis could have been called and denied all this.]

The story now put forward by the defence comes later. None of the witnesses at the trial ever gave evidence as to prosecutor being in pain or saying he was ill or lying down on the sofa. They heard to-day for the first time about the prosecutor's nose bleeding. It was a curious fact that none of the witnesses could say which eye was injured. It has never been suggested that the prosecutor was not robbed on that day. The suggestion of the defence must be that prosecutor was robbed in Eldon Road.

The evidence of prosecutor and the police constable was that both trouser pockets were torn. Moreover, the judge at the trial said the robbery, if there had been one, must have been very badly carried out, as the prosecutor seemed to have plenty of money left when he met Eva Harris.

Vaughan-Williams, in reply. If the jury had seen all the witnesses now called they would not have convicted. The butcher's evidence was most important. Lord Coleridge J. at the trial pointed out how vital to the case his evidence was. The defence has gone almost into the enemy's camp for evidence. Mrs. Thayer, who was practically the prosecutor's wife, would naturally not want to incriminate herself. It is suggested by the prosecution that it is curious Mrs. Thayer knew nothing of the alleged row outside in Eldon Road; but a row more or less in Eldon Road is nothing. As against her there is the evidence of Emily Harris, who has no interest in the case. She talks about the matter to a friend, and is called ultimately by the defendants. As to the torn pockets, it is impossible to say exactly what took place. If the prosecutor was robbed, it may be the thieves did not get all his money. He says he had about £5 on him originally; he probably had some in his waistcoat pocket, and may have put it in his trousers pockets after coming from the shop.

[Bray J.: The prosecutor admits he sent for fourteen flagons.]

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When Eva Harris came back, Mrs. Wright having been employed to keep an eye on the house in the meantime, the prosecutor was in a hospitable mood. He politely included the husband of Mrs. Wright in the party. He did not really mind how many came. As to the blood on his face, it was very natural there should be some there if he met with these injuries. But that was probably at the Theatre Royal. He had a handkerchief with him and kept it up to his face all the time; and that would account for its disappearance. But there was also evidence to the effect that when he got to the house he washed his face.

The Lord Chief Justice: It has been a great advantage to us to have the assistance to-day of the learned judge who tried the case. We are not satisfied with the verdict. The case is one which brings out into relief the impossibility of doing right without a thorough investigation such as would take place before a jury. This was more especially true as to the Lewis incident and the row in Eldon Road that afternoon. Mrs. Emily Harris voluntarily came forward and said she saw four men assaulting Pierce. If such injuries were inflicted, and many of his ribs broken, we have great difficulty in believing he could have done subsequently what he said he had done.

The whole case is in a very unsatisfactory condition. There ought to have been a fuller investigation by the prosecution. It was noticed in the summing up that the prosecutor's story was not confirmed by the cabman, who was not there.

The suggestion made by Lord Coleridge J. is curious in the light of to-day's evidence, viz., that the cabman would come forward and say what he has come and said if the story were true. We do not discredit his statement. Therefore I think we are entitled to call attention to the fact that the very witness whom the learned judge thought an important one has come forward and given the very evidence he expected him to give, and in addition, of course, we have the evidence of the row in Eldon Street. As to the prosecutor going about after sustaining injuries, it is well known that people may go about for some time ignorant of the fact that some of their ribs are broken. At 2.30 he goes to the police station and identifies three people who were in the house

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in Somerset Street. We cannot order a further investigation. We must regard the fact that Lord Coleridge J. commented on the absence of the cabman, and we must look to the additional corroboration. On the whole, if we err, we must err on the side of leniency, and therefore we think the conviction should be quashed.

Conviction quashed

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